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CHAPTER 5

Political Status of the ROC in Taiwan

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1. THE ROC IN TAIWAN

It was observed in Chapter 4, The State and Governments of China, that the Republic of China (ROC) was not a State before it moved its seat to the island of Taiwan, but was a government of the State of China. This chapter reviews the position of the government officials in Taiwan as well as that of foreign governments on the political status of the ROC, or more specifically whether the ROC has become a State, after it moved to Taiwan.

In 1945, immediately after Japan surrendered to the United States and its allies, the United States entrusted the ROC government with the administration of Taiwan.⁴⁷⁷ Thereupon, Jiang (Chiang) Kai-shek sent his army in the US ships to the island in October of 1945. On October 25, 1945, the Chinese Military Commander accepted the surrender of the Japanese Military Authority in an official ceremony in Taipei.

Jiang (Chiang) Kai-shek immediately established a military authority to rule Taiwan. In less than 2 years, a conflict between the Chinese Military Security Guards and the Taiwanese civilians led to bloodshed in the whole island. On February 28, 1947, the brutal treatment of a female sidewalk vendor in Taipei by a Chinese tobacco inspector angered the Taiwanese bystanders, who began to defend the woman. The ensuing conflict between the Taiwanese civilians and the Chinese military police turned into a revolt by the Taiwanese people against the ROC authority throughout the island. To suppress the revolt, Jiang (Chiang) Kai-shek in Nanjing (Nanking) quickly sent enforcement troops to Taiwan. Upon arrival in Taiwan, the troops shot thousands of unarmed Taiwanese indiscriminately on sight. After the revolt was put down, the ROC authority arrested and executed without trial thousands more of the Taiwanese, including many elites such as medical doctors and lawyers. The atrocity committed by the Chinese army was later called “the 228 Incident” or “the 228 Massacre.”⁴⁷⁸ Subsequent to the 228 Incident, further oppression of the Nationalist Chinese incited an anti-Chinese sentiment among the Taiwanese people, especially the intellectuals.

In 1949, the ROC government moved its seat to Taiwan. In the winter of 1949, the ROC government, having lost China proper to the

⁴⁷⁷ See *infra* text accompanying note 654.

⁴⁷⁸ On February 28, 1947, a Chinese official of the Taiwan Tobacco and Liquor Monopoly Bureau, while inspecting street vendors in Taipei, used a pistol to hit a Taiwanese female sidewalk vendor for selling smuggled cigarettes, who subsequently died. The official's brutal treatment of the woman angered the bystanders, who began to defend the woman. The ensuing scuffle between the police and the civilians led to a large-scale protest by the Taiwanese against the repression of Jiang (Chiang) Kai-shek's Chinese Nationalists. During the following days, Chiang's government sent a re-enforcement troop from China to the island and began an indiscriminate killing. It is estimated that at least 18,000 Taiwanese lost their lives during the atrocity. Tillman Durdia, *Formosa killings are put at 10,000; foreigners say the Chinese slaughtered demonstrators without provocation* (Nanking, March 28), N.Y. TIMES, 3/29/1947. For a vivid description of the incident, see Li-Thian-Hok, AMERICA'S SECURITY AND TAIWAN'S FREEDOM, Xlibris, www.Xlibris.Com, at 46–48.

Communists in a civil war, was forced to take exile in Taiwan on December 8, 1949. Jiang (Chiang) Kai-shek moved the political structure of the ROC to Taiwan, even though Taiwan was under a military occupation.

Before Jiang (Chiang) Kai-shek moved the seat of his government to Taiwan, he had ruled China under the authority of the ROC Constitution. After the 1911 revolution, the State of China became a republic. Several constitutions were promulgated by different governments until 1946 when the present ROC Constitution was promulgated by the ROC government seated in Nanjing (Nanking). The ROC Constitution was based on the political doctrine, “the Three people’s principles,” formulated by Sun Yat-Sen, the nominal leader of the 1911 revolution.⁴⁷⁹

The Constitution provides a presidential system with a National Assembly and five Institutes (*Yuan*). The President of the republic is the head of the State and also the head of the government exercising the executive power. The National Assembly “exercises political powers on behalf of the whole body of citizens,” in particular the function of electing and recalling the President and the Vice-president.⁴⁸⁰ Jiang (Chiang) Kai-shek, who was Chairman of the Chinese Nationalist Party (the Kuomintang or the KMT) at the time, was elected the first President in 1948 by the National Assembly convened in Nanjing (Nanking) pursuant to the ROC Constitution.⁴⁸¹

The five Institutes (*Yuan*) are five organs of the government (in the broad sense) collectively exercising the various powers of the State. They are the Executive Institute (The Executive *Yuan*), the Institute of Legislation (The Legislature *Yuan*), the Institute of Judiciary (The Judiciary *Yuan*), the Examination Institute (The Examination *Yuan*), and the Institute of Control (The Control *Yuan*). The Executive Institute, headed by the Premier, is the administrative organ under the President to implement the law enacted by the Institute of Legislation

⁴⁷⁹ “The three people’s principles” referred to Sun Yat-sen’s three principles of nationalism, democracy, and social well-being. The Constitution of the Republic of China, A COMPILATION OF THE LAWS OF THE REPUBLIC OF CHINA, V. 1. 1967. Publisher: Kang Chi-Chao. Taipei, Taiwan, at 3.

⁴⁸⁰ Arts. 25 and 27 of the Constitution of the Republic of China, A COMPILATION OF THE LAWS OF THE REPUBLIC OF CHINA. *Id.*

⁴⁸¹ In 1949, when Jiang (Chiang) Kai-shek’s army was overrun by the Chinese Communists, he stepped down from the Presidency for a few months until 1950 when he resumed the presidency.

and the ordinances of the President.⁴⁸² The Institute of Legislation (The Legislature *Yuan*) is the highest legislature of the country.⁴⁸³ The Institute of Judiciary (The Judiciary *Yuan*) is the highest judiciary.⁴⁸⁴ The Examination Institute is the highest organ in charge of matters relating to the selection and promotion of civil servants.⁴⁸⁵ The Institute of Control (The Control *Yuan*) exercises the power of impeachment and the power of reprimanding government officials, as well as auditing the governmental expenditures.⁴⁸⁶

The National Assembly, the Institute of Legislation, and the Institute of Control together are subsequently referred to as the three houses of the “congress.” Each house of the “congress” is composed of deputies elected from all Provinces and Autonomous Regions. The number of deputies to be elected from each Province is proportional to the size of its population and the number of deputies from each Autonomous Region is fixed. The Autonomous Regions included Mongolia and Tibet. Where it is relevant is that in 1946 when the ROC Constitution was promulgated Taiwan was not part of China: it was Japan’s territory.

In 1948 when the ROC government was losing the civil war to the Chinese Communists, the National Assembly, meeting in Nanjing (Nanking) in May of 1948, promulgated “Temporary Provisions Effective During the Period of Communists Rebellion Act” (“Temporary Provisions Act”), which allowed the President to enlarge his power without following certain procedural requirements prescribed by the Constitution.⁴⁸⁷ After the ROC government took exile in Taiwan in December of 1949, the ROC government also applied the Act to the island.

The 1948 Temporary Provisions Act allowed Jiang (Chiang) Kai-shek to rule Taiwan until his death. It suspended an article of the Constitution which limits the term of the President and the Vice-President to two

⁴⁸² *Id.* Art. 53.

⁴⁸³ *Id.* Art. 62.

⁴⁸⁴ *Id.* Art. 77.

⁴⁸⁵ *Id.* Art. 83.

⁴⁸⁶ *Id.* Art. 90.

⁴⁸⁷ Temporary Provisions Effective During the Period of Communists Rebellion Act (Temporary Provisions Act) was adopted by the ROC National Assembly on April 18, 1948, and promulgated on May 10, 1948. A COMPILATION OF THE LAWS OF THE REPUBLIC OF CHINA, V. 1., *supra* note 479. The Act was repealed on May 1, 1991 when the 1991 Amendment to the Constitution was adopted. See *infra* text accompanying note 554.

terms, thereby allowing Jiang (Chiang) Kai-shek to be reelected many times by the National Assembly until his death.⁴⁸⁸

In Taiwan, Jiang (Chiang) Kai-shek controlled the government apparatus including the “congress” during his life time. After the ROC government moved its seat to Taiwan, the Constitution continued to apply to the entirety of China in theory. When the ROC government and the “congress” went into exile in the island of Taiwan, most deputies of the “congress,” who were elected by the people in China, also followed the government to Taiwan. They continued to represent the people in China under the rule of the Chinese Communists. The National Assembly amended Temporary Provisions Act by adding a provision which authorized the President to issue ordinances for electing new congressional delegates in addition to the original delegates.⁴⁸⁹ The original delegates continued to represent their old congressional districts even after their original terms expired. Thus, for 40 years the congressional deputies were in fact permanent members of the “congress” until the 1991 amendment of the Constitution. Jiang (Chiang) Kai-shek could control the congressional deputies as his puppets because their livelihood depended on the KMT Party’s support.

Ever since Jiang (Chiang) Kai-shek arrived in Taiwan, he imposed a totalitarian rule on the Taiwanese. In 1954, Jiang (Chiang) Kai-shek had Martial Law amended to authorize trials of civilians by court martial for offenses against national security, and then declared implementation of the Martial Law in Taiwan. Special penal laws were enacted to suppress opposition. National security was placed under the control of the Military Security Guards. Many dissidents were tried and sentenced to death by court martial, or simply disappeared without trace.⁴⁹⁰

⁴⁸⁸ Temporary Provisions Act, *Id.* Art. 3, referring to Art. 47 of the ROC Constitution. Jiang (Chiang) Kai-shek resigned in 1949 to negotiate with the Chinese Communist Party. He resumed the Presidency in 1950 and continued in the position until his death in 1975.

⁴⁸⁹ *Id.* Art. 6 was amended to authorize President to issue ordinances for electing new congressional delegates in addition to the existing delegates.

⁴⁹⁰ The Martial Law was enacted in 1940, amended in 1954. The amendment permitted the President, with a resolution of the Conference of the Executive Institute (The Executive *Yuan*) and the consent of the Institute of Legislature (The Legislative *Yuan*), to declare the implementation of martial law. In the following three decades, the Chinese Nationalists continued to rule Taiwan under the Martial Law until 1987. As early as 1949, the US Department of State Policy Planning Staff at one time suggested that the US issue a “White Paper on China dealing with Formosa with particular emphasis being laid upon Chinese misrule of the islands since VJ-Day.” US Department of State/Foreign relations of the United States 1949. The Far East: China. Vol. IX (1949). “Chinese administration on the islands has been rapacious and oppressive and the chaos.” *Id.*

Jiang (Chiang) Kai-shek took three steps to legitimize his rule of the island of Taiwan and its inhabitants. The first step was that while in China he claimed that the island of Taiwan was returned to the ROC by the surrender of the Japanese military authority to the Chinese authority in Taipei in 1945, notwithstanding that the island was still Japan's territory. The second step was that the ROC government in China issued a decree in January of 1946 announcing that all the Taiwanese people residing in Taiwan "are restored" the citizenship of the ROC retroactively to October 25, 1945 when Japan surrendered,⁴⁹¹ even though the Taiwanese people still resided in Japanese territory and had neither renounced nor been deprived of their Japanese citizenship.

After the ROC government moved its seat to Taiwan, Jiang (Chiang) Kai-shek took a third step to legitimize his authority to rule Taiwan. He created some political slogans collectively characterized here as the "one China dogma." The one China dogma is, "There is only one China; China means the Republic of China; the Republic of China's territory consists of China proper and the island of Taiwan; and the People's Republic of China (PRC) illegally occupies the Republic of China's territory."⁴⁹²

From the beginning, Jiang (Chiang) Kai-shek's one-China dogma was a myth. When the ROC took exile in Taiwan in 1949, it had lost China forever. The Nationalists lost the trust of the people in China due to the mismanagement of the ROC officials. By 1950, the PRC government was firmly established, controlling China proper except for two small offshore islands (Kinmen and Matsu). In contrast, the ROC government only controlled the two Chinese small offshore islands and the island of Taiwan which was not China's territory. Thus, while there is only one China, China could not mean the ROC; the PRC did not "illegally occupy the ROC's territory" as the one-China dogma claimed. Although Jiang (Chiang) created the myth to legitimize his authority and power in Taiwan, since he was the paramount leader of the KMT Party, the Party and the government were able to permeate the dogma throughout the Taiwan society.

⁴⁹¹ See Chen Yi-nan, *ROC forced citizenship on unwary Taiwanese*, THE TAIPEI TIMES, Jan 20, 2011, p. 8., available at <http://www.taipeitimes.com/News/editorials/archives/2011/01/20/2003493942>. Last visited, 07/16/2015.

⁴⁹² "One China dogma (*i zhong jiao tiao* in Chinese)" is not an official name of a teaching or political philosophy. Rather, it is a general term referring to the collective political slogans of Jiang (Chiang) Kai-shek described in the quotation.

2. POSITION OF TWO JIANG (CHIANG)S ON THE POLITICAL STATUS OF THE ROC IN TAIWAN

Jiang (Chiang) Kai-shek, like most of the Chinese people, did not distinguish the concept of State and the concept of government and treated the ROC as a State. In addressing his countrymen Jiang (Chiang) Kai-shek often used an expression “our country the ROC.” After Jiang (Chiang) Kai-shek moved to the island of Taiwan, he still considered himself the legitimate leader of his country “the ROC.” He regarded the PRC as a traitor regime established by the Chinese Communists, who “had stolen the territory of his country the ROC.”

In Taiwan, Jiang (Chiang) Kai-shek never intended to establish a new State limiting its territory to the island of Taiwan. After the 1951 Peace Treaty of San Francisco was concluded, he still intended to retake the China mainland. In an attempt to motivate his army, he created a slogan: “Counter attack the mainland (Chinese Communists); retake the lost territory.” In 1964, on the eve of France switching its recognition from the ROC to the PRC, French President De Gaulle called Jiang (Chiang) Kai-shek and advised him of the imminent French action and that if Jiang (Chiang) would declare the ROC a new State limiting its territory to the island of Taiwan, France would recognize the new State and the ROC as its legitimate government. Jiang (Chiang) refused.⁴⁹³ He refused because such a move would lose the legitimacy of his ambition to recover his homeland.

After Jiang (Chiang) Kai-shek died in 1978 during his term of the presidency, his son Jiang (Chiang) Jing-guo succeeded to his power. Upon the death of Jiang (Chiang) Kai-shek, the Vice President Yen Chia-kan succeeded to the Presidency pursuant to the ROC constitution, but soon resigned to allow Jiang (Chiang) Jing-guo to become the President.⁴⁹⁴ During the lifetime of Jiang (Chiang) Kai-shek, Jiang (Chiang) Jing-guo had already built up a strong position in the ROC government. Jiang (Chiang) Kai-shek appointed him the Premier

⁴⁹³ This is an account of Dean Rusk, the former Secretary of State during the presidency of John Kennedy and Linden Johnson. When he began to teach international law at the University of Georgia, School of Law after Johnson's term expired, he and this writer taught international law together for one year. This writer learned of this historical episode during a private conversation at this writer's residence.

⁴⁹⁴ Jiang (Chiang) Jing-guo, President of the ROC (1978–88).

(officially “The President of the Executive Institute”) of the ROC,⁴⁹⁵ who also controlled the KMT Party.

Jiang (Chiang) Jing-guo never established a new State in Taiwan either. As the President of the ROC, Jiang (Chiang) Jing-guo never intended to establish a State limiting its territory to the island of Taiwan. He also relied on the one-China dogma to legitimize his rule of Taiwan. But he had no intention to retake the China mainland, and simply adopted a new slogan, “Unification of China by the Three People's Principles.”

To other States, the ROC in Taiwan was a government of China in exile. Until the conclusion of the Peace Treaty of San Francisco, the island of Taiwan, while under the administration of the ROC government at the assignment of the US Government, was Japan's territory. In 1951, when the United States and other Allied powers signed the Peace Treaty of San Francisco with Japan, the ROC was not a party to the Peace Treaty, though it also had conducted the war with Japan. When the United States and the United Kingdom were drafting the peace treaty, they could not include “the Republic of China” as a party because the War was between States, and the ROC was not a State, just a government. They did not include China as a party because they did not want either government to represent China in the Treaty: the PRC government which fought the United Nations (UN) forces in the Korean War⁴⁹⁶ was not recognized by most Western States as the legitimate government of China; the ROC government, which had lost most of China's territory, had no legitimacy to represent the State of China.

As stated earlier, in 1964 when France recognized the PRC and simultaneously withdrew its recognition of the ROC, the ROC did not become a State.⁴⁹⁷ Other Western States which followed France to accord

⁴⁹⁵ Jiang (Chiang) Jing-guo, Premier of the ROC (1972–78).

⁴⁹⁶ On June 27, 1950, the Security Council resolved to “[recommend] that the Members of the United Nations furnish such assistance to the Republic of Korea (South Korea) as may be necessary to repel the armed attack and to restore international peace and security in the area.” S.C. Res. 83, UN SCOR, 474th mtg. at 85, UN Doc. S/1511 (1950). On July 7, 1950, the Security Council then resolved to “[recommend] that all Members providing military forces and other assistance pursuant to Security Council resolutions [82 (1950) and 83 (1950)] make such forces and other assistance available to a unified command under the United States of America.” S.C. Res. 84, UN SCOR, 476th mtg. at 85–86, UN Doc. S/1588 (1950).

⁴⁹⁷ Jean-Luc Domenach, *Sino-French Relations: A French View* in CHINA'S FOREIGN RELATIONS, NEW PERSPECTIVES 87 (Chun-tu Hsüeh, ed. 1982).

recognition to the PRC also recognized it as the government of China. The ROC continued to be a government of China in exile after the Peace Treaty of San Francisco entered into force.

In 1970 when the UN General Assembly debated which government, the ROC or the PRC, should take China's seat, the PRC accused the US Government and Japanese government of plotting to create two "Chinas." The Japanese Ambassador to the UN Min Aichi replied that "Japan will continue to espouse the '1-China' policy,"⁴⁹⁸ implying that the ROC was not a new State.

When the United States withdrew recognition of the ROC in 1979, the ROC did not become a State. Then President Jiang (Chiang) Jing-guo did not intend to establish a new State limiting its territory to the island of Taiwan. Other States followed the United States, leaving only a number of small States which continued to recognize the ROC as China's representative government. The ROC government became isolated in the international community.

In Taiwan, since 1945 when the ROC government took over the administration of the island, the political power was in the Chinese people. For 43 years, the political power was in Jiang (Chiang)'s family: first Jiang (Chiang) Kai-shek and then his son Jiang (Chiang) Jing-guo. Most government officials and deputies of the "congress" were Chinese, whom the Taiwanese referred to as "the mainlanders" or "people from the other Provinces."

The Chinese totalitarian rule finally aroused anti-Chinese sentiment among the Taiwanese people. When the Chinese soldiers arrived in Taiwan on US Navy ships in 1945, they called themselves "the liberators" and were welcomed by the Taiwanese. But since 1947, for decades, the people lived in fear of persecution under the shadow of the 1947 "228 Incident." In the 1960s, after a long period of the totalitarian rule under the martial law, a Taiwan independence movement began to sprout. In 1979, the year after the United States withdrew its recognition of the ROC government, an incident, subsequently called "The Incident of

⁴⁹⁸ On November 22, 1970, the then Japanese Ambassador Min Aichi said "that Japan will continue to espouse the '1-China' policy despite closeness of the vote [in the UN]." See N.Y. TIMES ABSTRACTS, 11/ 22/1970, at 9. See *infra* note 536 and the accompanying text for the voting in the United Nations.

Formosa magazine,”⁴⁹⁹ illustrated the KMT's totalitarianism. In December of that year, Taiwanese political leaders gathered in Kaohsiung City to celebrate the 31st anniversary of the signing of the UN Convention of Human Rights. After the meeting, as the Taiwanese politicians and the audience were preparing to march on the street they were blocked and beaten by the ROC's Military Security Guards and police. The conflict between them resulted in the arrest of many Taiwanese politicians. Many were sentenced to a long-term imprisonment.

Another incident occurred in 1981. A Professor Wen-chen Chen of Carnegie-Mellon University, while visiting Taiwan in July 1981, was found dead from falling from a second floor in the campus of his alma mater, The National Taiwan University, after being questioned by the Military Security Guards on the day before. Although the authority announced suicide as the cause of death, many people would not rule out a political assassination.

While Jiang (Chiang) Kai-shek called Taiwan “Free China,” the Taiwanese people subsequently called the period under the two Jiang (Chiang)s “the White Terror era.”⁵⁰⁰ Although the ensuing unrest in the Taiwanese society eventually forced Jiang (Chiang) Jing-guo to lift the martial law in 1987, a year before his death, the Taiwanese people were still mistreated by the Nationalist Chinese.

The next section will closely examine the position of the United States on the political status of the ROC during the era of the two Jiang (Chiang)s.

⁴⁹⁹ A brief narration of the incident follows: “In November of 1979, the publisher of ‘Formosa’ magazine requested the government for a permit for an outdoor rally to celebrate the 31st anniversary of the UN Convention of Human Rights. The permit was issued but was restricted to a rally, no parade. On December 10, 1979, after the rally, the participants began to walk on the street. The Military Security Guards and police attempted to stop them from walking on the street and a conflict began. The police used tear gas to disperse the civilians. Both sides had light casualties. Next day, the Military Security Guards and the police began to arrest Taiwanese political leaders who participated at the rally as well as those who did not. Many of them were sentenced to long imprisonment terms. Senator Edward Kennedy made a statement criticizing the method of handing by the ROC government.” The US Congress Record, 126, No. 35. (March 5, 1980).

⁵⁰⁰ See A MEMORIAL FOR PROFESSOR CHEN WEN-CHEN—A TAIWANESE, published by Chen Wen-chen Memorial Foundation, Inc. Ann Arbor, Michigan, 1982.

3. US POSITION ON THE POLITICAL STATUS OF THE ROC BEFORE LEE TENG-HUI

Whatever the two Jiang (Chiang)s' characterization of the ROC in the one-China dogma, there was no doubt to other States that the ROC was a government of the State of China from the very beginning when it was established in 1912 and was a government after it moved its seat to the island of Taiwan in 1949.

The United States' treatment of the ROC is particularly relevant, since it became the occupying state of Taiwan and the dominant power in the region after World War II. Its Executive, Legislative, and Judicial branches all held the same position—that the ROC was only a government of the State of China. A closer analysis of the view of each branch follows.

A. The Executive Branch

As discussed in Chapter 2, The State and Sovereignty, it is the power of the Executive head, the President in the United States, to grant diplomatic recognition. It was pointed out before that the Executive branch of the United States considered the ROC a government of the State of China from the time when it was established in 1912. Its recognition of the ROC in 1913 was recognition of the government, since the United States had long recognized the State of China before 1913.

The ROC did not become a State independent of China after it moved its seat to the island of Taiwan. From October 25, 1971 on, the PRC government has replaced the ROC government to represent China in the United Nations. The US Government, however, continued to recognize the ROC in Taiwan as the representative government of China until 1979.⁵⁰¹ On December 30, 1978, the Carter Administration finally accorded recognition to the PRC and simultaneously withdrew its recognition of the ROC.⁵⁰² When the US recognized the PRC, it did not recognize the PRC as a new State, but recognized it as the representative government of China. Since the State which the PRC represented was still China, the United States had to withdraw simultaneously its

⁵⁰¹ See Ruan Ming, *Time to Put an End to Fallacy of "One China,"* TAIPEI TIMES, 11/14/2003, available at <http://taiwansecurity.org/TT/2003/TT-141103-1.htm>. Last visited 11/08/2004.

⁵⁰² The United States established diplomatic tie with the PRC and terminated the tie with the ROC on January 1, 1979. See *President's Memorandum for All Departments and Agencies: Relations with the People of Taiwan*, reprinted in 1979 U.S.C.A.N. 36, at 75.

recognition of the ROC. Upon withdrawal of its recognition of the ROC, the United States also terminated the US–China (the ROC) Mutual Defense Treaty because the treaty had lost its purpose—defending against the invasion of the PRC government, which was now recognized as the representative government of the other party to the treaty.

The withdrawal of the recognition of the ROC by the US demonstrated that the US regarded the ROC as a government. As it was discussed in Chapter 2, The State and Sovereignty, in State practice, while recognition of a State cannot be withdrawn, recognition of a government may be withdrawn. The withdrawal of recognition of the ROC by the United States and other States did not make the ROC a new State as some people in Taiwan have claimed. Withdrawal of recognition is an act of destruction of a relationship, not an act of creation of a new entity.

B. The Legislative Branch

Nor did the US Congress consider the ROC a State. When the United States terminated the US–China (the ROC) Mutual Defense Treaty, the US Congress enacted the Taiwan Relations Act (the “Act”)⁵⁰³ to protect the people of Taiwan against the invasion of the Chinese Communists as well as the security and interest of the United States in the Western Pacific. If the ROC was a State, then the US Government could enter into a mutual defense treaty with it, instead of employing such a round-about maneuver. The United States does not have South Korea Relations Act or Japan Relations Act. It does not need such domestic law because both South Korea and Japan are States. The two States and the United States have signed mutual defense treaties.⁵⁰⁴ Thus, the United States has obligations and power under the treaties to protect them. Some may say that Taiwan Relations Act treats the ROC like a State.⁵⁰⁵ It is true that in

⁵⁰³ Taiwan Relations Act, Pub. L. No. 96-8, ’2, 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. 3301–3316 (2004)). Approved by the 96th Congress on April 10, 1979, effective January 1, 1979 (Sec. 18).

⁵⁰⁴ Agreement between the United States and the Republic of Korea relating to military assistance was signed on June 27, 1974. Mutual Assistance Agreement between the United States and Japan was signed on March 8, 1954.

⁵⁰⁵ Taiwan Relations Act, *supra* note 503. “Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such law shall apply with such respect to Taiwan.” *Id.* Sec. (4)(b).

the Act, the ROC is treated *like* a State by the United States and enjoys some of the same prerogatives and courtesy accorded by the US Government to other States. But if the United States treats the ROC like a State, the implication is that the ROC is not a State, only similar to one. In fact, after the United States withdrew recognition of the ROC, it no longer regarded the ROC as a “government.” Taiwan Relations Act calls it “the governing authorities.”⁵⁰⁶

Taiwan Relations Act is a US domestic legislation, not a treaty. If the PRC government uses force against Taiwan,⁵⁰⁷ the US Government has no treaty obligation toward the ROC government to protect Taiwan, though the US Government may, as the occupying power, defend Taiwan pursuant to the Taiwan Relations Act or other considerations.

C. The Judicial Branch

Furthermore, the judicial branch of the United States has not considered the ROC a State either.⁵⁰⁸ In the United States, a constitutional principle is that on matters of recognition of a foreign State and a foreign government, the judicial branch follows the decisions and opinions of the Executive branch because they are political questions.⁵⁰⁹ The Court in *Cheng Fu Sheng v. Rogers*⁵¹⁰ stated,

*“It is fundamental that such questions as whether a foreign country or a foreign government should be formally recognized are problems that are not to be solved by the courts, but are political matters that are to be decided by the executive and legislative departments of the Government. On such topics the President and the Secretary of State speak for the United States, and the courts are obligated to follow their pronouncements.”*⁵¹¹

⁵⁰⁶ The Act calls it “[t]he governing authorities on Taiwan recognized as the Republic of China prior to January 1, 1971.” *Id.* Sec. 15(2).

⁵⁰⁷ It would be considered exercise of sovereignty beyond its border.

⁵⁰⁸ One exception is *New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc. et al.*, 954 F.2d 847, 853 (2d. Cir. 1992). See *infra* discussions at note 526.

⁵⁰⁹ *U.S. v. Pink*, *supra* note 372.

⁵¹⁰ *Cheng Fu Sheng v. Rogers*, 177 F. Supp. 281 (D.D.C. 1959), remanded; 280 F.2d 663 (US App. D.C. 1960), remanded; 294 F.2d 26 (US App. D.C. 1961). 177 F. Supp. 281 (D.D.C. 1959).

⁵¹¹ *Id.* The court cites *Jones v. US*, *infra* note 973, as authority.

Nevertheless, the US courts, in deciding the application of an international treaty or a municipal law, had occasions to give their reasons that the ROC was not a State. Two cases involving the application of the Warsaw Convention⁵¹² confirmed that the ROC was not a State. In the first case, *John Lee and Margaret Lee v. China Airlines Ltd.*,⁵¹³ two passengers on a flight from Hong Kong⁵¹⁴ to San Francisco sued China Airlines in a US federal court sitting in California for injuries caused by a sudden drop of the airplane of 31,000 ft in the air, off the coast of California. The defendant argued that the US federal court had no jurisdiction to try the case. The plaintiffs argued that the federal court had jurisdiction, and, if their action were dismissed for lack of jurisdiction, they would be compelled to bring the action abroad, either in Taiwan⁵¹⁵ or in Hong Kong,⁵¹⁶ where they would not receive an adequate hearing of their claims because, they argued, the Warsaw Convention would not apply to either Hong Kong or Taiwan. The court, in holding that the Warsaw Convention applied and it had no subject matter jurisdiction according to the Convention, dismissed the action.⁵¹⁷ The court added that if the plaintiffs sued in either Hong Kong or Taiwan, “[t]he Warsaw Convention will figure prominently in the decision making process over there because both Hong Kong and *Taiwan* adhere to it.”⁵¹⁸

The court statement that “Taiwan adhere[s] to [the Warsaw Convention]” implied that Taiwan was a contracting party of the Warsaw Convention. It should be noted, however, that at the time when the accident occurred, while the PRC government of China ratified and adhered to the Warsaw Convention in July 1958, the ROC government in

⁵¹² Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter “Warsaw Convention”].

⁵¹³ 669 F. Supp. 979 (C.D. Cal. 1987).

⁵¹⁴ Hong Kong was still a territory of the United Kingdom at the time. *Id.* at 980.

⁵¹⁵ Taipei was the carrier’s principal place of business. *Id.* at 979.

⁵¹⁶ Hong Kong was the passenger’s place of destination, because the plaintiffs purchased round trip tickets in Hong Kong. *Id.*

⁵¹⁷ The court said, “Under Article 28 of the Convention, an action can be brought under the terms of the Convention only in the following places: (1) the carrier’s domicile; (2) the carrier’s principal place of business; (3) the place where the ticket was purchased; or (4) the passenger’s place of destination.” *John Lee and Margaret Lee*, 669 F. Supp. at 980. California was none of the locations mentioned above. For applicability of Warsaw Convention, see *infra* note 522.

⁵¹⁸ *Id.* at 984 (emphasis added).

Taiwan had neither ratified nor adhered to the Warsaw Convention. Thus, the reason that the court ruled that Taiwan was a contracting party was because it regarded Taiwan a part of China and covered by the Warsaw Convention; the ROC was not a State.

The second case in which an American court held that the ROC was not a State was *Atlantic Mutual Insurance Co. v. Northwest Airlines*.⁵¹⁹ In this case, Tacoma Boat Building Co. (Tacoma) delivered some machinery to Northwest Airlines (“Northwest”) for shipment from Milwaukee, Wisconsin, to Taipei, Taiwan. Tacoma claimed that certain parts of their machinery components were damaged due to Northwest’s negligence during the air transport of the components. Atlantic Mutual Insurance Co.⁵²⁰ and Tacoma jointly sued Northwest in Milwaukee for damages. In the federal district court sitting in Milwaukee,⁵²¹ the issue was whether the state court or the federal court had the subject matter jurisdiction to try the case. The plaintiffs, which argued that the state court had the jurisdiction, claimed that the Warsaw Convention did not apply on the grounds that Taiwan was not a party to the Convention and, thus, the federal court lacked subject matter jurisdiction. The defendant, Northwest, argued that the Warsaw Convention applied to the case and, thus, the federal court had jurisdiction. In reaching the conclusion that the Warsaw Convention applied, the federal court said that it had “federal subject matter jurisdiction . . . only if Taipei, Taiwan—the flight destination—also was a party to the convention.”⁵²²

⁵¹⁹ 796 F. Supp. 1188, 1191 (E.D. Wis. 1992).

⁵²⁰ It had paid Tacoma for the loss under an insurance policy and was subrogated Tacoma’s right against Northwest.

⁵²¹ The plaintiffs originally brought the case to the circuit court for Milwaukee County, Wisconsin, a state court, which at the defendant’s motion, remanded the case to the federal court sitting in Milwaukee. *Id.* at 1189.

⁵²² The court stated:

“[T]he convention is applicable where . . . the contract of transportation (e.g., a plane ticket) involves travel from one ‘High Contracting’ party to another . . . [A] High Contracting party is a state which is an original signatory to the convention or one which ratified the convention or filed declarations of adherence to the convention after it went into force. Further, a declaration of adherence to the convention by a state may include colonies or territories of that state.”

Id. 1190–91 (citations omitted).

Holding that Taiwan was a party to the convention, the federal court explained as follows:

*Since 1949 to the present [1992], two governments—the Republic of China and the People's Republic of China [PRC]—claim to be the sole legitimate government of "China," which both governments agree is comprised of mainland China and Taiwan. In reality, the Republic of China retains control only over the island of Taiwan while the PRC retains control over the mainland; neither government has asserted that they are two separate countries.*⁵²³

The court further stated:

*The world community was compelled to determine whether the ROC or the PRC would receive formal recognition as the legitimate government of China. On December 30, 1978, the US formally recognized the PRC as the sole government of China, in its entirety, and withdrew recognition from the ROC. Over 100 other nations and the UN have done the same.*⁵²⁴

Although the ROC in Taiwan had never adhered to the Warsaw Convention in its own name, the court accepted the defendant's argument that Taiwan was a party to this convention because of the declaration made by the PRC when it ratified the Warsaw Convention. The PRC's declaration stated that the convention "shall of course apply to the entire Chinese territory including Taiwan," and that "the recognition of the PRC as the sole government of China by the United States, the United Nations and over 100 other nations legitimizes this declaration despite the continued existence of the ROC."⁵²⁵

⁵²³ *Id.* at 1190 (citations omitted).

⁵²⁴ *Id.* (citation omitted).

⁵²⁵ *Id.* at 1191. The court then stated that it "is not vested with the power [to review]" the executive branch's recognition of the PRC as the sole government of China. *Id.* Subsequent to the decision, the parties attempted to settle before a magistrate judge of the US District Court for the Eastern District of Wisconsin. Coordination Council For North American Affairs (The ROC's office in New York City having the functions of a general consulate) intervened contesting the district court's finding that Taiwan was a province of the People's Republic of China. The US District Court dismissed its petition and the Council appealed to the US Court of Appeals For the Seventh Circuit. The Seventh Circuit affirmed the judgment below on the ground that the Council was not a proper party to intervene. *Atlantic Mutual Insurance Company and Tacoma Boatbuilding Company, Inc. (Plaintiffs-Appellees) v. Northwest Airlines, Inc. (Defendant Appellee), and Coordination Council For North American Affairs, (Intervenor-Appellant)*. 24 F. 3d 958.

The two cases discussed above demonstrated that the US courts did not consider the ROC a State after the ROC moved its seat to Taiwan, but regarded it only as a government of China.⁵²⁶ Whether the courts were correct in stating that “Taiwan was a part of China” is a different issue to be dealt with later in this work. However, regardless of the characterization of the ROC by Jiang (Chiang) Kai-shek and Jiang (Chiang) Jing-guo while they were in Taiwan, the United States at the time did not regard the ROC as a State.

4. UN POSITION ON THE STATUS OF THE ROC IN TAIWAN BEFORE LEE TENG-HUI

In 1949, the Chinese Communists did not establish a new State. As stated earlier, the PRC is a new government of China. Thus, the PRC did not apply to join the United Nations as a new member. Instead, it claimed that it was entitled to represent an existing member, China, in the United Nations on the ground that it was China’s sole legitimate government.

Until 1972, the State of China was represented by the ROC government in the United Nations. When the United Nations was formed in 1945, the ROC was the government that represented China. To the United Nations, the ROC was still the representative government of China after Jiang (Chiang) Kai-shek took exile in the island of Taiwan.

The PRC attempted to replace the ROC in the United Nations for 22 years. In its attempt to replace the ROC, the PRC solicited the assistance of its allies in the Soviet block. In September 1950, a year after the PRC was established, Cuba proposed in the United Nations to include in

⁵²⁶ One exception that an US court held that Taiwan was a “nation” was *New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc. et al.*, 954 F.2d 847 (2d Cir. 1992), in which the court stated that Taiwan was a nation, and thus the Treaty of Friendship, Commerce, and Navigation between the Republic of China and the United States was still in force. However, the court could have reached the same conclusion without determining the political status of Taiwan. When the United States shifted the recognition from the ROC to the PRC government in 1979, the US President issued a Memorandum stating that “Existing international agreements and arrangements in force between the United States and Taiwan shall continue in force.” US Code Cong. & Admin. News 75. In *Mingtai Fire & Marine Insurance Co., Ltd. v. United Parcel Service*, 177 F.3d 1142, at 1144–46 (9th Cir. 1999), the Ninth Circuit Court of Appeals decided the applicability of the Warsaw Convention to the territory of Taiwan based on “the political departments’ position that Taiwan is not bound by China’s adherence to the Warsaw Convention” without “independently determin[ing] the status of Taiwan.” *Mingtai*, F.3d at 1142.

the annual meeting agenda of the General Assembly a discussion of the question of China's representation. The General Assembly established a Special Committee consisting of seven members to consider the question.⁵²⁷ In December 1950, the General Assembly adopted a resolution recommending that the representation question "should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case,"⁵²⁸ but did not address directly the question of China's representation.

During the 1951 and 1952 General Assembly sessions, no proposal to decide China's representation was made. The UN's armed forces were fighting the PRC's "volunteer army" in the Korean Peninsula. Perhaps, no State thought it appropriate to raise the question.

After the armistice of the Korean War, the proposal to include the question of China's representation in the General Assembly annual meeting agenda was resurrected. Each year from 1953 to 1960, a member of the Soviet bloc made the proposal. Each time the proposal was rejected by a majority vote.⁵²⁹

In the 1960s, the US Government insulated the ROC's position in the United Nations by a procedural maneuver. When a similar proposal was made again in 1961, the US Government (the Kennedy Administration) invoked an article in the UN Charter to create a procedural barrier for any proposal to change the representation with respect to China in the United Nations. The General Assembly adopted a resolution proposed by the US Government to designate the representation question

⁵²⁷ See G.A. Res. 490, UN GAOR, 5th Sess., 277th plen. mtg., Supp. No. 20, at 153, UN Doc. A/1775 (Sep. 19, 1950), available at <http://www.un.org/depts/dhl/resguide/r5.htm>. Last visited 02/15/2011.

⁵²⁸ G.A. Res. 396, UN GAOR, 5th Sess., 325th plen. mtg., Supp. No. 20, at 98, UN Doc. A/1775 (Dec. 14, 1950). *Id.*

⁵²⁹ See G.A. Res. 800, UN GAOR, 8th Sess., 432d plen. mtg., Supp. No. 17, at 225, UN Doc. A/2630 (1953); G.A. Res. 903, UN GAOR, 9th Sess., 473d plen. mtg., Supp. No. 21, at 171, UN Doc. A/2890 (1954); G.A. Res. 990, UN GAOR, 10th Sess., 516th plen. mtg., Supp. No. 19, at 231, UN Doc. A/3116 (1955); G.A. Res. 1108, UN GAOR, 11th Sess., 580th plen. mtg., Supp. No. 17, at 159, UN Doc. A/3572 (1956); G.A. Res. 1135, UN GAOR, 12th Sess., 686th plen. mtg., Supp. No. 18, at 245, UN Doc. A/3805 (1957); G.A. Res. 1239, UN GAOR, 13th Sess., 755th plen. mtg., Supp. No. 18, at 151, UN Doc. A/4090 (1958); G.A. Res. 1351, UN GAOR, 14th Sess., 803d plen. mtg., Supp. No. 16, at 235, UN Doc. A/4354 (1959); G.A. Res. 1493, UN GAOR, 15th Sess., 895th plen. mtg., Supp. No. 16, at 184, UN Doc. A/4684 (1960).

as an “important question” under the UN Charter.⁵³⁰ “Important questions” require a two-thirds majority vote of the members present.⁵³¹ From 1962 to 1964, every year when a proposal was made in the General Assembly to replace the ROC with the PRC in the United Nations, the General Assembly adopted a resolution making the question of China’s representation an “important question.”⁵³² Each time the proposal to replace the ROC government with the PRC government did not receive the required two-thirds majority vote.

A crucial event in the international politic occurred in 1965: France broke her diplomatic ties with the ROC and accorded her recognition to the PRC. Soon after that, other Western States began to follow. However, attempts to replace representatives of the ROC with representatives of the PRC failed again in the UN General Assembly in 1967,⁵³³ 1968,⁵³⁴ and 1969⁵³⁵ because the proposals did not receive the required two-thirds majority vote for the “important question.”

In September 1970, the US Government began to change its policy toward the PRC. By 1970, more than one half of the UN members recognized the PRC as the representative government of China.⁵³⁶ At the same time, the number of the States which recognized the ROC

⁵³⁰ The General Assembly “[d]ecides, in accordance with Article 18 of the Charter of the United Nations, that any proposal to change the representation of China is an *important question*.” G.A. Res. 1668, UN GAOR, 16th Sess., 1080th plen. mtg., Supp. No. 17, at 296, UN Doc. A/5100 (1961) (second emphasis in *italic* added).

⁵³¹ See UN CHARTER *supra* note 383 art. 18. Sec. 2 (Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting.).

⁵³² For the Soviet Draft Proposal, see Adlai E. Stevenson, *United Nations Rules Out Change in Representation of China*, *Plen. Statement Before the General Assembly* (Dec. 1 and Dec. 14, 1961), in DEP’T ST. BULL., Jan. 1962, at 117.

⁵³³ See G.A. Res. 2271, UN GAOR, 22d Sess., 1610th plen. mtg., Supp. No. 16, at 241, UN Doc. A/6716 (1967).

⁵³⁴ See G.A. Res. 2389, UN GAOR, 23d Sess., 1724th plen. mtg., Supp. No. 18, at 116, UN Doc. A/7218 (1968).

⁵³⁵ See G.A. Res. 2500, UN GAOR, 24th Sess., 1808th plen. mtg., Supp. No. 30, at 213, UN Doc. A/7630 (1969).

⁵³⁶ There were 125 members at the 1970 UN General Assembly plenary session. The ROC government “is recognized diplomatically by more than 60 of the members of this organization.” Christopher H. Phillips, *Twenty-fifth General Assembly Rejects Move to Change Representation of China in the United Nations*, *Plen. Statement Before the General Assembly* (Nov. 12, 1970), in DEP’T ST. BULL., Dec. 1970, at 734.

decreased correspondingly. In 1970, the Nixon Administration was willing to allow representatives of the PRC to take China's seat in the General Assembly and in the Security Council on a condition that the representatives of the ROC remained in the General Assembly.⁵³⁷ The PRC, on the other hand, insisted that it would take over China's seat only if the representatives of the ROC were expelled from the United Nations.⁵³⁸ The US Government refused to accept the PRC's condition, and again proposed that the representation question was an "important question."⁵³⁹ The proposal was adopted by a narrower margin this time.⁵⁴⁰ A proposal by Albania, which followed, to expel the representatives of the ROC was again defeated.⁵⁴¹

In 1971, the United States sustained defeat in the United Nations. In September 1971 when the General Assembly convened, the US Government (the Nixon Administration) again proposed a dual representation: both the PRC and the ROC were represented in the UN General Assembly, and the PRC also occupied China's seat in the Security

⁵³⁷ See *Id.*

⁵³⁸ See *Id.* at 733–34.

⁵³⁹ Resolution 2642 of the General Assembly, entitled *Representation of China in the United Nations*, was adopted by the 1913th plenary session of the General Assembly on November 20, 1970. See G.A. Res. 2642, UN GAOR, 25th Sess., Supp. No. 28, at 6, UN Doc. A/8028 (1970).

Recalling the recommendation contained in its resolution 396 (V) of 14 December 1950 that, whenever more than one authority claims to be the Government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations, the question should be considered in the light of the purposes and principles of the Charter of the United Nations and the circumstances of each case.

Recalling further its decision in resolution 1668 (XVI) of 13 December 1961, in accordance with Article 18 of the Charter, that any proposal to change the representation of China is an important question, which, in General Assembly resolutions 2025 (XX) of 17 November 1965, 2159 (XXI) of 29 November 1966, 2271 (XXII) of 28 November 1967, 2389 (XXIII) of 19 November 1968 and 2500 (XXIV) of 11 November 1969, was affirmed as remaining valid,

Affirms again that this decision remains valid. 1913th plenary meeting 20 November 1970.

⁵⁴⁰ The votes were 66 in favor and 52 against, with 7 abstentions. See Taiwan Documents Project, *Resolution on the Representation of China in the United Nations* (Nov. 20, 1970), available at <http://www.taiwandocuments.org/un2642-XXV.htm>. Last visited 09/09/2004.

⁵⁴¹ The votes were 51 in favor and 49 (including US vote) against, with 25 abstentions. See Phillips, *supra* note 536, at 735 footnote 2.

Council.⁵⁴² The General Committee⁵⁴³ prepared a General Assembly agenda which included both the United States proposal calling for “the continued right of representation of the ROC [in the General Assembly]”⁵⁴⁴ and Albania’s proposal calling for the representatives of the PRC to take China’s seat as well as for the expulsion of the representatives of the ROC from the United Nations.⁵⁴⁵ In the General Assembly, the United States proposal to make the question of expelling the representatives of the ROC from the United Nations an “important question” was, for the first time, defeated.⁵⁴⁶ Thus, China’s “representation question” was to be decided by a majority vote.

⁵⁴² On August 2, 1971, Secretary of State William Rogers said at a press conference, “The United States accordingly will support action at the General Assembly this fall calling for seating the People’s Republic of China. At the same time the United States will oppose any action to expel the Republic of China.” William Rogers, *Sec’y Rogers Announces US Policy on Chinese Representation in the UN*, Statement to News Correspondents (Aug. 2, 1971), in DEP’T ST. BULL., Aug. 1971, at 193.

⁵⁴³ One of the General Committee’s functions is to recommend the General Assembly agenda.

⁵⁴⁴ The US proposed Resolution is entitled, “The Representation of China in the United Nations.” The draft resolution, in part, reads, “The General Assembly . . . 1. Hereby affirms the right of representation of the People’s Republic of China and recommends that it be seated as one of the five permanent members of the Security Council; 2. Affirms the continued right of representation of the Republic of China.” George H. W. Bush, *UN Votes to Seat People’s Republic of China and Expel Representatives of Republic of China*, Plen. Statement Before the General Assembly (Oct. 18, 1971), in DEP’T ST. BULL., Nov. 1971, at 549.

⁵⁴⁵ G.A. Res. 2758, UN GAOR, 26th Sess., Supp. No. 29, at 2, UN Doc. A/8439 (1971). The Proposal stated:

Restoration of the lawful rights of the People’s Republic of China in the United Nations. The General Assembly, Recalling the principles of the Charter of the United Nations,

Considering that the restoration of the lawful rights of the People’s Republic of China is essential both for the protection of the Charter of the United Nations and for the cause that United Nations must serve under the Charter,

Recognizing that the representatives of the Government of the People’s Republic of China are the only lawful representatives of China to the United Nations and that the People’s Republic of China is one of the five permanent members of the Security Council,

Decides to restore all its rights to the People’s Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at United Nations and in all the organizations related to it.

Id. See also Phillips, *supra* note 536, at 735 footnote 2.

⁵⁴⁶ See *Id.* at 556 footnote 3.

The proposed resolution of Albania put to the vote at the end of the debates on October 25, 1971 was adopted.⁵⁴⁷ In the General Assembly, the United States again attempted to create dual representations, but failed. When Albania's proposed resolution to replace the ROC with the PRC was presented for voting, the Nixon Administration voted against Albania's proposal. But Albania's proposed resolution was carried by a large margin.

Resolution No. 2758 of the General Assembly stated,

*The General Assembly ... decides to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.*⁵⁴⁸

The Resolution became effective immediately and the representatives of the ROC left the UN Headquarters.

Resolution 2758 of the United Nations did not involve an expulsion of a member State. When the General Assembly expelled the ROC, it did not remove a member even though "the Republic of China" was the name of a member and also a permanent member of the Security Council. As mentioned earlier, in 1945 when China joined the United Nations under the name "The Republic of China," international society

⁵⁴⁷ The votes were 76 in favor 35 against. *See Id.*

⁵⁴⁸ The full Resolution is entitled, "Restoration of the Lawful Rights of the People's Republic of China in the United Nations." G.A. Res. 2758, GAOR, 26th Sess., Supp No. 29, at 2, UN Doc. A/8439 (1971) [hereinafter 'Resolution 2758'].

The full Resolution 2758 follows:

The General Assembly,

Recalling the principles of the Charter of the United Nations,

Considering that the restoration of the lawful rights of the People's Republic of China is essential both for the protection of the Charter of the United Nations and for the cause that United Nations must serve under the Charter,

Recognizing that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council,

Decides to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at United Nations and in all the organizations related to it.

Id. *See* Phillips, *supra* note 536, at 735 footnote 2.

regarded that the State that joined the organization was the State of China and that the ROC was the government representing China at the time. During the 1971 debate in the General Assembly resulting in the passage of Resolution 2758, the State involved was the State of China. The proposal was to expel the ROC government, not to expel one of its members, China.

The Resolution of the United Nations involved a question of representation in the United Nations. Since in principle only one government was allowed to represent a member in the United Nations, the question at the time was: Which government, the ROC or the PRC was to represent the member China. The Resolution made this point clear in the language adopted. It “[d]ecides to restore all its rights to the People’s Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations.”⁵⁴⁹ Thus, when the United Nations expelled the ROC, what it expelled was a government, not a State. After the representatives of the PRC replaced the representatives of the ROC in the United Nations, the UN documents listing its members state “China” as its member and also indicates that China was admitted on October 24, 1945, a date prior to the establishment of the PRC. The name plate on the desk where the representatives of the PRC to the UN sit states “China,” not “the People’s Republic of China” or “the PRC.”

Resolution 2758 created the UN’s China policy. The Resolution has three propositions: there is only one China; its government is the PRC; in the United Nations, the people in China will be represented by the PRC government thereafter. If the propositions have become the UN’s policy over China, it is quite different from “the UN’s one China policy” that subsequently developed.

5. POSITION OF LEE TENG-HUI ON THE POLITICAL STATUS OF THE ROC

A. Lee’s Initial Position—The KMT’s One-China Dogma

In 1988, the political power of the ROC fell on a Taiwanese. When Jiang (Chiang) Jing-guo died in January 1988 before his second term expired, Vice-President Lee Teng-hui assumed the presidency for the rest of Jiang (Chiang)’s term. Lee was the first Taiwanese to become the

⁵⁴⁹ *Id.*

ROC President.⁵⁵⁰ He, at the same time, became the Chairman of the Chinese Nationalist Party (The KMT). In 1990 when Jiang (Chiang) Jing-guo's residual term expired, the National Assembly elected Lee to be the President for a term of six years.⁵⁵¹

When Lee first assumed the presidency in 1988, the ROC was already isolated in the international society. An overwhelming number of the States recognized the PRC as the representative government of China. Fewer than 40 States still recognized the ROC as the representative government of China. All of those States were small and, except the Holy See (the Vatican), had received significant financial aid from the ROC government.

From the beginning, Lee Teng-hui, like his predecessors, considered the ROC a "country" that had sovereignty over the entire China as well as the island of Taiwan. As the Chairman of the KMT, Lee adhered to the KMT's one-China dogma. He had no intention to establish a new State limiting its territory to the island of Taiwan.

The people of Taiwan were confused as to the political status of the ROC. Throughout the rule of Jiang (Chiang) Kai-shek and Jiang (Chiang) Jing-guo, the people of Taiwan lived under the shadow of the one-China dogma. But to them, China, *Zhong (Chung) Guo* or the "Middle Country," referred to the country called the PRC or *Zhong (Chung) Hua Jen Min Kung He Guo* across the Taiwan Strait. They, however, had different perceptions on the political status of the ROC. Although some people understood that the ROC was a government of the State of China exiled on the island of Taiwan, most people regarded the ROC as a country, largely due to the influence of the Chinese name of the ROC, *Zhong (Chung) Hua Min Guo*, and the one-China dogma.

After Lee took the office of the presidency of his own term in 1990, he embarked on some political reforms. In 1991, he terminated the Temporary Provisions Effective During the Period of Communists Rebellion Act⁵⁵² pursuant to its provision.⁵⁵³ The most important reform was restructuring of the "congress" to reflect the reality that the ROC no longer governed the territory and the people under the control of the

⁵⁵⁰ Lee Teng-hui, President of the ROC (1988–2000).

⁵⁵¹ Lee was elected on March 21, 1990 by the National Assembly, and inaugurated on May 20, 1990.

⁵⁵² For Temporary Provisions Effective During the Period of Communists Rebellion, see *supra* note 487.

⁵⁵³ *Id.* Art. 9 of the Temporary Provisions provides, "The termination of the Period of Communist Rebellion shall be declared by the President." *Id.*

PRC. Up until that time, the “congress” included “representatives” of regions in mainland China that were under the control of the PRC. In order to reform composition of the deputies in the three houses of the “congress” to reflect the reality, Lee initiated an amendment to the ROC Constitution by the National Assembly in 1991. The Amendment of the Nanjing (Nanking) Constitution of 1946⁵⁵⁴ changed the structure of the “congress.” The “permanent” deputies who represented the people who never elected them were persuaded to retire with favorable entitlements to quell their opposition. The amendments were welcomed by the people of Taiwan.

However, the amended ROC Constitution does not forsake the one-China dogma, in particular the ROC’s claim of sovereignty over “Mainland China.” The 1991 Amendment consists of 10 Articles. The most important provisions concern the formation of the members of the three houses of the “congress.” The first three Articles provide the number of deputies in the National Assembly,⁵⁵⁵ the Institute of Legislation (the Legislature *Yuan*),⁵⁵⁶ and the Institute of Control (the Control *Yuan*).⁵⁵⁷ The Amendment creates two geographic regions for the purpose of selecting the deputies: “the Free Region” and “the Entire Country.”⁵⁵⁸ The term “the Free Region,” by implication, refers to the territory under the actual control of the ROC: the “Province of Taiwan” and China’s two offshore islands, Kinmen and Matsu. The term “the Entire Country,” by implication, refers to both the territory under the control of the ROC and the territory under the control of the PRC. Thus, the amended ROC Constitution still applies, in theory, to entire China as well as Taiwan.

⁵⁵⁴ The Amendment of the Constitution, adopted by the second extraordinary session of the First National Assembly on April 22, 1991 and promulgated by the President on May 1, 1991 (The 1991 Amendment), available at <http://www.ey.gov.tw/en/Upload/WebArchive/4697/Constitution.pdf>. Last visited 10/9/2013.

⁵⁵⁵ Art. 1 of the (1991) Amendment, *Id.*, replaces Articles 26 and 135 of the Constitution providing the number of deputies in the National Assembly.

⁵⁵⁶ Art. 2 of the (1991) Amendment, *Id.*, replaces Art. 64 of the Constitution providing the number of deputies in the Institute of Legislation (The Legislature *Yuan*).

⁵⁵⁷ Art. 3 of the (1991) Amendment, *Id.*, replaces Art. 91 of the Constitution providing the number of deputies in the Institute of Censorship (or the Institute of Control—The Control *Yuan*).

⁵⁵⁸ Another geographical term created by the (1991) Amendment is “the Mainland Region.” The term is not used for the election of deputies. Art. 10 of the Amendment, *Id.*, provides that “The rights and obligations between the people in the Free Region and the Mainland Region, and the disposition of other affairs may be regulated by other law.”

Under the amended Constitution, the people in “Mainland China” still have representation in the ROC’s new “congress.” For each house of the “congress,” the number of deputies elected by the residents of cities or prefectures in the Free Region (Taiwan) is determined by the size of the population of the cities or the prefectures. In addition, a fixed number of deputies collectively represent the entire population of “the Entire Country.”⁵⁵⁹ The latter are appointed by political parties according to a system of proportional representation: each political party gains additional seats proportionate to the votes it receives in the congressional election. Thus, the people in “Mainland China” are represented by the deputies selected to represent “the Entire Country.”

In 1992, Lee persuaded the National Assembly to make another amendment to the ROC Constitution.⁵⁶⁰ The major change of the 1992 Amendment to the Constitution was on the method of electing the President and the Vice-President. It changed from an indirect election method—an election by the National Assembly—to a direct election method—a general election by the people in the “Free Region.” Other than that, the amended ROC Constitution continued to apply to the territory and the people under the control of the PRC government.⁵⁶¹

In 1996 when Lee Teng-hui’s term expired, he was reelected for a term of 4 years in a general election pursuant to the 1992 Amendment to the Constitution. In the spring of 1996, Lee ran for the presidency as the candidate of the KMT Party against Peng Ming-min, the candidate of the opposition party, the Democratic Progressive Party (the DPP). During the election campaign, Peng, who was once imprisoned during Jiang (Chiang) Jing-guo’s term for writing a “Manifesto of the Taiwanese self-preservation,” was perceived to be pro-independence. But Peng lost the

⁵⁵⁹ The fixed numbers of deputies who represent the “Entire Country” are as follows: For the National Assembly, “80 deputies from the entire country without regard to the regions.” Amendment to the Constitution, *supra* note 554, Art. 1, Item 1, Para. 4. For the Institute of Legislation, “30 deputies from the entire country without regard to the regions.” Amendment to the Constitution, *Id.* Art. 2, Item 1, Para. 4. For the Institute of Control, “5 deputies from the entire country without regard to the regions.” Amendment to the Constitution, *Id.* Art. 3, Item 1, Para. 4.

⁵⁶⁰ Amendment to the Constitution of the Republic of China, 1992, adopted by the 2nd National Assembly on May 27, 1992, and promulgated by the President on May 28, 1992 (The 1992 Amendment), available at <http://www.oop.gov.tw/roc/charter/eadded.htm>. Article 12 provides “The president and the vice president shall be directly elected by the entire populace of the Free Region of the Republic of China.” *Id.*

⁵⁶¹ After 1992, there were five more amendments to the Constitution. But none of them is relevant to the discourse of this subject.

election not because of his political stand but due to other factors. One factor was that Lee as the President had achieved some political reforms, leading some voters to perceive that Lee, a Taiwanese, was in a better position to pave a way for the eventual independence of Taiwan; another factor was that the KMT Party, which had ruled Taiwan for one half a century, had built up influence on the voters by controlling local officials of the compartmentalized municipalities, an administrative system based on the system established by the former Japanese government. The 1996 election pursuant to the amended Constitution was the first time in the history of the ROC that a general election was employed to elect the President and the Vice President. Some Taiwanese politicians claimed that the election of the President and the Vice-president by a general election turned the ROC into a new State.⁵⁶²

However, Lee disappointed many of his supporters in his 1996 inaugural speech when he called for a “peaceful reunification of China.”⁵⁶³ He proclaimed that “there is only one China; there is no so-called ‘Taiwan independence.’”⁵⁶⁴ The speech followed the lines of Jiang (Chiang) Kai-shek’s one-China dogma. The term “reunification of China” implied that Taiwan was part of China. While Lee had been perceived by many people in Taiwan as pro-Taiwan, his proclamation in his inaugural speech confused them and created a society which was, as a New York Times reporter described it, “in a schizophrenic environment.”⁵⁶⁵ For the next 5 years, Lee maintained the same position.

Though Lee had said that the ROC was a *country* many times, to other States the ROC in Taiwan was a government of China exiled in the island. Neither of the two amendments to the Constitution made the ROC a new State, as some Taiwanese politicians claimed. To other States, it was the PRC government in Beijing, rather than the ROC government in Taipei, that represented the State of China and exercised its

⁵⁶² Speech of Annette Lu (of the DPP Party), Vice-President of the ROC from 2000 to 2008, delivered on July 11, 2010 at the Taiwanese Association Conference, Plaines Region, at St. Louis.

⁵⁶³ In the inaugural speech, President Lee stated that both sides of the Taiwan Strait should seek unification of the country. When Lee advocated reunification of the state, he restated his conviction of the one-China dogma. “Mr. Lee added ‘China is a country divided and under separate rule’ implying that there was only one China.” F.J. Khargamvala, *Taiwan’s Lee To Be Sworn in Today*, HINDU, 05/20/1996, at 2.

⁵⁶⁴ Lee’s inaugural speech, available at <http://www.taipei.org/whatsnew/speech.htm>. Last visited 08/01/1998.

⁵⁶⁵ Patrick E. Tyler, *The China and Taiwan Problem; How Politics Torpedoed Asian Calm*, N. Y. TIMES, 02/11/1996, at 1.

sovereign power. As a matter of theory, Lee's insistence on the one-China dogma that Taiwan was part of China could unintentionally lend color to the PRC's claim that "Taiwan is [China's] renegade province."

B. The "special state-to-state relationship" Statement

An event in 1999 surprised the people in Taiwan as well as foreign governments and political observers. On July 9, 1999, in an interview by a German TV reporter, President Lee said that "The Republic of China has been a sovereign country since it was founded in 1912. The 1991 Amendment to the Constitution designated the cross-Straits relationship as a special state-to-state relationship. Consequently, there is no need of declaring independence."⁵⁶⁶

⁵⁶⁶ Interview of the ROC President Lee Teng-hui by Dr. Guenther Knabe, Head of Deutsche Welle Asia Programs (Deutsche Welle television broadcast, 07/10/1999) [hereinafter "Interview of President Lee Teng-hui"], on July 9, 1999. Deutsche Welle, TV broadcasting on July 10, 1999. Interview of President Lee Teng-Hui.

The following is part of the interview broadcast on Deutsche Welle (The English translation is provided by the TV station):

Knabe: You are considered as a renegade province by Beijing's government. That is, of course, a permanent intimidation and threat from the Mainland. How are you coping with these dangers?

Lee: The historical fact is, that since the establishment of Chinese Communist regime in 1949, it has never ruled the territory under the ROC (Republic of China)—Taiwan, Penghu, Kinmen, and Matsu. The 1991 Constitutional Amendment had designated cross-Straits relationship as special state-to-state relationship, rather than an internal relationship between a legitimate government and a renegade group or between a central government and local government.

Knabe: Declaring Taiwan as an independent state seems to be no realistic option. Beijing's "one country two systems" is not acceptable for the majority of the people in Taiwan. Is there any compromise between these two positions. And if there is one, what does it look like?

Lee: The Republic of China has been a sovereign country since it was founded in 1912. The 1991 amendment to the Constitution (promulgated in 1947 in Nanking, China) designated cross-Straits relation as special state-to-state relation. Consequently, there is no need to declare independence.

Id.

After the program showing the interview, the anchorman, Brian Thomas, asked Dr. Knabe, "Based on your discussion with President Lee, did you get the impression that he was prepared to declare independence?" *Id.* Knabe replied, "I think not. He stopped short of doing that." *Id.*

See also *China Threatens Envoy's Trip*, GREENSBORO NEWS & RECORD, 97/17/1999, available in 1999 WL 6953820.

The statement of Lee stirred up political debates both in Taiwan and abroad. The statement was subsequently referred to as the “special state-to-state relationship statement.” Some called it the “Two-state doctrine.”

C. Reaction in Taiwan and the ROC Government’s Clarification

In Taiwan, the topic was a sensitive one and the reactions to the statement were diverse. The day after the interview was broadcast in the German TV, Taiwan’s newspapers printed exciting headlines, claiming that Lee Teng-hui had created two Chinas during the interview. Many Taiwanese joyfully acclaimed that Lee had declared independence. Some even started to call Lee “Father of the country.”

Whether Lee intended to create confusion or his statement created an unintended consequence was a subject of debates. His officials were caught off guard. There was no advanced warning to them that he would make such a drastic statement. They were quickly engaged in damage control, lest there would be a misunderstanding inside and outside of Taiwan. The immediate action for them to take was explaining to the people in Taiwan what Lee meant by his “special state-to-state relationship” statement in the context of the one-China dogma. They did not believe that Lee had declared independence because he said that “there is no need of declaring independence.” But he had said something in the interview contrary to what the KMT had thus far preached to the people after Jiang (Chiang) Kai-shek moved to the island of Taiwan.

However, the ROC officials were confused. They could not reach a consensus on the meaning of the statement. On July 12, the Commissioner of the Mainland Affairs Su Q (Chi) said that “Lee Teng-hui means ‘two countries in one nation.’”⁵⁶⁷

On July 15, the Chief of Information Bureau Cheng Jian-ren also said that “The special state-to-state relationship means ‘two countries in one nation.’”⁵⁶⁸

But Cheng quickly withdrew his explanation next day. He said that “‘Two countries in one nation’ is a wrong interpretation; I have to think it over for a better explanation.”⁵⁶⁹

⁵⁶⁷ Available at http://issue.udn.com/FOCUSNEWS/TWOSTATES/Official_Statement/T_official_statement/07_13_013.htm.

⁵⁶⁸ Available at http://issue.udn.com/FOCUSNEWS/TWOSTATES/Official_Statement/T_official_statement/07_16_022.htm.

⁵⁶⁹ Available at http://issue.udn.com/FOCUSNEWS/TWOSTATES/Official_Statement/T_official_statement/07_22_029.htm.

He never further publicly clarified the meaning of the statement, probably because he could not come up with a sensible explanation.

Lee himself, realizing that he had created a controversy, attempted to clarify his own statement. Less than two weeks after the interview, he took an opportunity of trying to explain his statement. At a meeting of the Taipei Chapter of International Rotary Club on July 20, 1999, when he was asked to explain the “special state-to-state relationship,” he replied that “[t]he [ROC] government is not engaged in the Taiwan independence [movement]. Without equal status in a negotiation [with the PRC government], problems such as smuggling of drugs and guns or transmitting of the foot-and-mouth disease,⁵⁷⁰ are difficult to resolve.”⁵⁷¹ It was not much of an explanation of the controversial statement. Instead of providing the meaning of “the special state-to-state relationship,” he merely explained why he made the statement.

If the ROC officials were confused, it was because the statement itself was confusing. In fact, there were outright contradictions in Lee's statements made during the interview, if the word “state” in the “special state-to-state relationship” meant an independent territorial political institution. The first aspect of contradiction regarded the time when the ROC became a “State.” Lee explained in the interview that “the 1991 constitutional amendment had designated cross-Straits relationship as special state-to-state relationship, rather than an internal relationship between a legitimate government and a renegade group or between a central government and local government.”⁵⁷² By 1999 when Lee was interviewed, the PRC government was already recognized by a great majority of the States as the representative government of China—a government which called Taiwan a “renegade province.” Thus, Lee's statement implied that the ROC was upgraded to a State from a “local government” by the Amendment to the ROC Constitution in 1991. However, in the same interview, Lee also stated that “the ROC was a sovereign country since 1912.”⁵⁷³ Was it 1912 or 1991 when the ROC was established as a “State”? For sure, he did not mean that the ROC became a State limiting its territory to the island of Taiwan at the time of the interview. In fact,

⁵⁷⁰ It is a contagious disease carried by animals from China. Deborah Kuo, *In Taiwan FMD Spreads to Chiayi, Officials Say Milk Safe*, WORLD NEWS CONNECTION, 01/24/2000.

⁵⁷¹ *President Lee reasserts the “two countries doctrine,”* THE PACIFIC TIMES (Los Angeles), 07/22/1999, p. 1.

⁵⁷² See *supra* note 566.

⁵⁷³ *Id.*

as discussed earlier, when the ROC was established in 1911, it was a government of China. China was a State long before the establishment of the ROC

The second aspect of contradiction there would be was on the statehood of the ROC, if the word “state” meant an independent territorial political institution. If the word “state” in his statement meant independent territorial political institution, Lee’s statement in the interview meant both the ROC and the PRC were independent territorial political institutions. Then, the 1991 Amendment to the ROC Constitution also had the same effect of making both the ROC and the PRC States in 1991. However, in 1991 there was only one China, the ROC, under the amended ROC Constitution. To other States, though there was also only one China, the State China was represented by the PRC.

The third aspect of contradiction if the word “state” in his statement meant an independent territorial political institution was with the one-China dogma. When Lee made the statement in the 1999 interview, it would be the first time an ROC President attempted to seek an equal status between the ROC and the PRC: declaring that both were independent territorial political institutions, each with its own territory. Yet, there was no provision in the 1991 Amendment which could be interpreted to have turned the ROC into a State limiting its territory to the island of Taiwan, or have created a “special state-to-state relationship” between the ROC and the PRC. On the contrary, the ROC still attempted to exercise sovereign power over China under the 1991 amended Constitution. In amending the ROC Constitution in 1991, the ROC did not discard the KMT’s one-China dogma.

If interpreting the word “state” in the “special state-to-state relationship” statement as “independent territorial political institution” makes no sense, the word “state” must be given a different meaning.

D. The Meaning of the “special state-to-state relationship” Statement

It will make more sense if the word “state” in the “special state-to-state relationship” statement is rendered as “government.” The circumstances under which Lee made the statement would shed some light on the meaning of the word. In the television broadcast, during the interview while the German Deutsche Welle TV Asian expert Dr. Guenther Knabe asked questions in English, Lee replied in Mandarin Chinese with a simultaneous English translation. Lee’s Chinese words that were rendered

“state-to-state” in English translation were “*Guo* (country) and *Guo* (country).” Since both the Chinese terms for the Republic of China or *Zhong* (*Chung*) *Hua Min Guo* and the People’s Republic of China or *Zhong* (*Chung*) *Hua Jen Min Kung He Guo* end with the word *Guo* (country), Lee’s statement “*Guo* to *Guo* relationship” in fact referred to “the Republic of China” to “the People’s Republic of China” relationship. As it was explained before, though both the ROC and the PRC use the word “*Guo* (country)” at the end of their Chinese names, both the ROC and the PRC are governments of the State of China. Thus, Lee’s statement means that the ROC and the PRC [should be] in equal status in the relationship between the two governments.

Lee’s own explanation at the Rotary Club confirmed this interpretation. He explained that “[t]he [ROC] government is not engaged in the Taiwan independence [movement]. Without equal status in a negotiation [with the PRC government], problems . . . are difficult to resolve.”⁵⁷⁴ A negotiation is conducted between governments. Thus, however Lee characterized the ROC, his statement, in fact, referred to “the government to government relationship.”

Maybe, Lee himself was aware that he was not talking about a normal State-to-State relationship and, thus, used the word “special” to describe the relationship between the ROC and the PRC. After more than 40 years since Jiang (Chiang) Kai-shek created the one-China dogma, much of the world politic had changed at the time when Lee was interviewed: The UN passed Resolution No. 2758 expelling the ROC from the organization; a great majority of the world community had recognized the PRC as the representative government of China. The PRC government now treated the ROC as “renegade group.” It was the ROC government that struggled to seek to be an equal to the PRC government. If Lee’s “government [was] not engaged in the Taiwan independence”⁵⁷⁵ as he said, then it just sought for an equal status between the two governments for negotiation.

E. Reaction of Foreign Governments

The reaction of foreign governments was uniformly reserved. Practically, no States considered that Lee’s statement had turned the ROC into a new State limiting its territory to the island of Taiwan. To foreign

⁵⁷⁴ See *supra* note 571.

⁵⁷⁵ *Id.*

governments and political observers, the ROC was a new government of the State of China when it was established in 1912. When the PRC was established in 1949, it was also a new government of China. Lee's "special state-to-state relationship" statement was not a declaration establishing a new State limiting its territory to the island of Taiwan.

The Deutsche Welle interviewer did not see a declaration of independence in Lee's statement either. Immediately after the German TV broadcast showing the interview, the anchorman, Brian Thomas, asked the interviewer Gruenther Knabe: "Based on your discussion with President Lee, did you get the impression that he was prepared to declare independence?" Knabe emphatically replied, "I think not. He stopped short of doing that."⁵⁷⁶ A few days after Lee's interview, US Senator Frank H. Murkowski (R-Alaska) dismissed a suggestion that "Taiwan has virtually declared independence by President Lee Teng-hui's statement [about the cross-Straits relationship]."⁵⁷⁷

Three months after Lee made the statement, the UN Secretary General Kofi Annan also rejected any view that the ROC had become a State by Lee's statement. In September 1999, a severe earthquake struck the central part of the island. Many people died. Many more were injured, lost their houses, and traumatized. Immediately thereafter Annan announced that the United Nations had to wait for the approval of the PRC government before the UN Office for the Coordination of Humanitarian Affairs could send a disaster assessment team to what he called "the Taiwan Province of China."⁵⁷⁸ If in Annan's view Taiwan was a "Province of China," the ROC in Taiwan could not be a State. Whether Annan was correct in characterizing the island of Taiwan as a "Province of China" is a different issue to be analyzed later, but his view was that the ROC in Taiwan was not a State because no State can be a province of another State.

⁵⁷⁶ *Id.*

⁵⁷⁷ *US Senator Sees No Change in Taiwan's China Policy*, CENTRAL NEWS AGENCY, 07/17/1999, available in 1999 WL 17720726.

⁵⁷⁸ See Antonio Chiang, *Taipei Crisis, Beijing Opportunity*, INT'L HERALD TRIBUNE, 09/27/1999; *UN Sends Coordinating Rescue Team to Taiwan*, 09/22/1999, AGENCE FRANCE-PRESSE, available in 1999 WL 25110592; Corky Siemaszko, *Taiwan Digging Out, Frantic Rescuers Hunt for Quake Survivors*, DAILY NEWS, 9/22/1999, at 7. See *UN Sends Coordinating Rescue Team to Taiwan*, AGENCE FR. PRESSE, 09/22/1999; Corky Siemaszko, *Taiwan Digging Out, Frantic Rescuers Hunt for Quake Survivors*, DAILY NEWS, 09/22/1999, at 7.

6. POSITION OF CHEN SHUI-BIAN ON THE POLITICAL STATUS OF THE ROC

In March 2000, a general election was held before the end of Lee Teng-hui's term. The three way race was among Chen Shui-bian of the DPP, Lian Zhan of the Chinese Nationalist Party (The KMT), and Soong Chu-yu (James Soong), who had left the KMT to form The People First Party. Chen Shui-bian (Chen) won the election. Chen, like Lee, was a native Taiwanese. It was the first time the Chinese Nationalist Party lost the executive power of the government, though the Party still retained a majority in the "congress."

Although Chen was perceived by his supporters as pro-independence, in public he wavered on his stance on the political status of the ROC throughout his presidency. During the campaign for the president of the ROC, his announced policy toward China was that of compromise and cooperation. He advocated integration of Taiwan with China. A majority of the Taiwanese cast their votes for him because the alternative was worse. In his May 20, 2000 inaugural speech, Chen angered many of his Taiwanese constituencies by announcing a blatantly negative agenda.

Chen declared that his China policy was that of "four-nos and one have-no": "as long as the Chinese Communist Party regime has no intention to use military force against Taiwan, I pledge that during my term in office I will not declare independence; I will not change the country name; I will not push forth the inclusion of the so-called 'state-to-state relationship' concept in the Constitution; I will not promote a referendum to change the status quo in regards to the question of independence or unification; I have no plan to abolish the National Reunification Council or the National Reunification Guidelines."⁵⁷⁹

In essence, Chen had a "no Taiwan independence" policy.

But in August 2002, Chen suddenly changed his position on the political status of the ROC. This time, he claimed that the ROC was a country separate from China. When the World Federation of Taiwanese Associations, an organization formed by the overseas Taiwanese

⁵⁷⁹ See Chen Shui-bian, *Dawn of a Rising Era*, TAIPEI TIMES, 05/21/2000, available at <http://www.taipetimes.com/News/archives/2000/05/21/0000036938>. Last visited 05/04/2010. Chen subsequently claimed that it was the US Government (the Clinton Administration) that forced him to make such policy announcement. See *infra* text accompanying note 1021.

associations, held an annual conference in Tokyo, Japan, Chen gave a speech to the group via close circuit TV on August 5. During the speech, Chen suddenly, departing from his prepared speech, proclaimed that “Taiwan and China are two countries, each on one side of the Taiwan Strait and that the (ROC) Institute of Legislation (the Legislature *Yuan*) should consider passing a referendum law [permitting the people] to protect its sovereignty.”⁵⁸⁰

The Taiwanese were jubilant. The proclamation became known as the “two countries each on one side [of the Taiwan Strait]” statement. Chen used the word “Taiwan,” even though he was the President of the ROC. He often used “Taiwan” instead of “the ROC,” possibly to please the people of Taiwan. From then on, Chen claimed that Taiwan or the ROC had sovereignty.

In March 2004, Chen Shui-bian was reelected for a second term of the presidency. In the presidential campaign, the competition was between Chen, who sought a second term, and Lian Zhan of the KMT Party. Chen won again in the general election. During the campaign, Chen often proclaimed that the ROC was a “sovereign country.” In February 2004, in an interview with a reporter, he said that “The ROC is a sovereignty[sic] independent country,” but also said that “Taiwan is a sovereignty[sic] independent country.”⁵⁸¹ So, after he was reelected, he announced that he would not use a referendum to create a new Constitution, just amend it.⁵⁸²

But in 2005 President Chen again angered his supporters by making an ambiguous statement on the political status of the ROC. On February 24, 2005, he and his former political rival, The People First Party Chairman James Soong, issued a joint statement. It was not clear why the President had to join with a political rival to make the statement, but the statement said that “According to the Constitution of the Republic of

⁵⁸⁰ Sandy Huang, *Pan blue camp pans Chen's talk*, TAIPEI TIMES, Monday, 08/5/2002, P.1, available at <http://www.taipetimes.com/News/front/print/2002/08/05/0000159038>. Last visited 03/04/2011.

⁵⁸¹ *Strait Talking*, In an exclusive interview, Former President Chen Shui-bian rejects the mainland's 'one-China' policy. TIME ASIA, 02/16/2004. The statement “The ROC is a sovereignty independent country” in Chinese literally means that The ROC is a country whose sovereignty is independent. The statement “Taiwan is a sovereignty independent country” in Chinese literally means that Taiwan is a country whose sovereignty is independent.

⁵⁸² Joseph Kahn and Chris Buckley, *Taiwan's President Tones Down His Pro-Independence Oratory*, N.Y. TIMES, 05/21/2004, Sec. A, p. 12, C5.

China (the ROC), our country's status and position is defined as the *de facto* and *de jure* status quo existing [with the PRC each] on the opposite side of the Strait." But then, Chen pledged in the same joint statement that "during my term as president, I will not declare independence, [and] will not promote a referendum to change the status quo on the issue of independence or unification."⁵⁸³

Although the language was ambiguous, for sure it was not a declaration establishing a new State separated from the State of China. In fact, Chen in the joint statement said clearly that he "will not declare independence." Soong, who was a pro-China politician, could not have agreed to a make a joint statement declaring independence of the ROC.

Like his predecessor Lee Teng-hui, Chen was simply confused as to the political status of the ROC thinking that it was a country. As a consequence, he constantly made statements that did not make sense in term of international law. For instance, after stating that he would not declare independence in 2005, in an interview in November of 2006 with a Financial Times reporter he claimed that "Taiwan is a sovereignty[sic] independent State."⁵⁸⁴ With such a political leader, the people of Taiwan lived in an ever-confused environment.

A. Reactions of Other States

Notwithstanding Chen's repeated statement that "The ROC is a sovereignty [sic] independent country," or "Taiwan is a sovereignty [sic] independent country," the United Nations and its related organizations as well as the United States did not consider the ROC or Taiwan a sovereign State during his presidency.

In 2003, World Health Organization (WHO) echoed Kofi Annan's view that "Taiwan is a province of China," implying that Taiwan was not a State. For many years, the ROC applied to WHO to be an "observer," not as a member. Every time, the application was rejected. In April 2003, a disease known as "severe acute respiratory syndrome (SARS)" spread to the island of Taiwan. Not being a member of WHO, the ROC

⁵⁸³ See *supra* text accompanying note 579.

⁵⁸⁴ *Financial Times*, Interview with Former President Chen, Office of the President, Republic of China, News Release, 11/3/2006, available at <http://www.president.gov.tw/en/news-release/print.php?id=1105499283>. Last visited 11/15/2006. Interview With Taiwanese Former President Chen Shui-bian, THE WASHINGTON POST, Friday, 10/10/2003. www.washingtonpost.com/ac2/wp-dyn/A9815-2003Oct10.?language=printer. Last visited 11/06/2006.

government in Taiwan could not receive information provided by the organization for preventing the spread of the disease. A month earlier in March 2003, the ROC government applied, as it had done repeatedly several years in the past, to WHO to become an observer at its annual meeting, World Health Assembly (WHA). When the WHA opened its General Session in Geneva in May 2003, it again rejected the ROC's application, even though the SARS disease continued to spread in Taiwan. The WHO shared Kofi Annan's view on the political status of the ROC, and referred to Taiwan as "the Taiwan Province, China" in its website.⁵⁸⁵ If Taiwan was a province of China, the ROC could not be a State.

Later in May 2003, Kofi Annan, as the Secretary General of the United Nations again made a statement implying that the ROC was not a State. Puzzled by the WHO's action or inaction, the UN Press Club decided to hold a press conference⁵⁸⁶ at the UN Headquarters in New York City to discuss the WHO's decision in rejecting the ROC in its efforts to gain entry into the organization. The Press Club invited a ROC official in New York City,⁵⁸⁷ equivalent to the rank of a consulate general, to speak at the conference. When the ROC official attempted to enter the UN building, Kofi Annan barred him from entry "because of the organization's one-China policy."⁵⁸⁸ Kofi Annan's statement—the organization (the United Nations)'s one-China Policy—implied that Taiwan was part of China and that the ROC in Taiwan was not a State in the eyes of the United Nations.

The position of the United States was the same. It did not regard the ROC as a State. In October 2004, the US Secretary of State Colin Powell made some remarks on Taiwan's sovereignty that drew protests in Taiwan. On his way to China, Powell gave an interview to a CNN

⁵⁸⁵ See *World Health Organization Changes Travel Recommendation for Taiwan Province, China*, June 17, 2003 (changing a previous advisory that recommended postponing all but essential travel to Taiwan, in order to contain a spread of severe acute respiratory syndrome (SARS)), available at <http://www.who.int/mediacentre/news/>. Last visited 10/01/2004; see also UN DAILY NEWS DIGEST, *WHO Urges Precautions in Labs After Worker in Taiwan, China, Gets SARS*, 12/17/2003 (using the expression "Taiwan, Province of China"), available at <http://www.un.org/news/>. Last visited 10/01/2004.

⁵⁸⁶ The press conference took place on May 23, 2003. See Colum Lynch, *UN Bars Taiwanese Official From Briefing*, WASH. POST, 05/24/2003, at A22.

⁵⁸⁷ Director of the Taipei Cultural and Economic Office (Previously called "the Taiwan Coordination Council").

⁵⁸⁸ See *UN Bars Taiwanese Official From Briefing*, *supra* note 586.

reporter on October 25, 2004. During the interview, Powell made two remarks. The first remark was, “[t]here is only one China; Taiwan is not independent. It does not enjoy sovereignty as a nation.” His second remark was, “[w]e want to see both sides not take unilateral action that would prejudice an eventual outcome, a reunification that all parties are seeking.”⁵⁸⁹ While Powell’s view that “[all parties] are seeking a reunification” was not correct, his first statement that “[The ROC] does not enjoy sovereignty as nation” simply reflected the position of the US Government. A senior US officer repeated the US position on the political status of the ROC in 2007. In September 2007, Dennis Wilder, Senior Director for Asian Affairs of the White House National Security Council, said that “Taiwan, or the Republic of China, is not at this point a state in the international community.”⁵⁹⁰

7. POLITICAL STATUS OF THE ROC UNDER LEE AND CHEN IN INTERNATIONAL LAW

It was concluded in the previous Sections that regardless of the characterization of former President Lee and former President Chen on the political status of the ROC in Taiwan, other States and the United Nations did not consider the ROC a State after it moved to the island of Taiwan. This section will apply State theory and international law discussed in Chapter 2, The State and Sovereignty, to the ROC to see whether it met the requirements of a State after it moved its seat to Taiwan.

As it was observed in Chapter 2, The State and Sovereignty, a territorial political institution with the required elements of a State becomes a State by an act of declaration. It was also pointed out that after the declaration, for the political institution to establish a State effectively, it must act consistently with the fact that it is a State, i.e., asserting its statehood and acting like a State in international affairs. This section will review the

⁵⁸⁹ *Interview With Anthony Yuen of Phoenix TV, US Department of State, Former Secretary of State Collin L. Powell, Speeches and Remarks*. 2004 October. During his visit to China, while in Beijing Powell gave an interview to a television reporter on October 25, available at <http://www.state.gov/secretary/former/powell/remarks/c12960.htm>. Last visited 11/7/2006.

⁵⁹⁰ Chieh-yu Lin and Y.F. Low, *UN secretary-general stops calling ‘Taiwan part of China*, 09/06/2007, available at <http://www.taiwanbasic.com/un/cna/taiwanpart.htm>. Last visited 03/17/2009. Also available at <http://www.cna.com.tw/eng/topread.php?id'200709060011>. Last visited 08/19/2010.

acts of the ROC in Taiwan in the world community to see whether the ROC met the two requirements.

A. There Was No Act of Declaration Establishing a State

For the ROC to become a State, it has to declare independence from China limiting its territory to the area under its actual control—Taiwan. The ROC government under Jiang (Chiang) Kai-Shek and his son Jiang (Chiang) Jing-*guo* never intended to establish a new State independent of China or build a separate identity. Both the father and the son stuck to the one-China dogma.

Many people in Taiwan, in particular the Taiwanese politicians, claim that the ROC turned into a State at a certain historical event during the presidency of Lee Teng-hui or Chen Shui-bian. The most common events that have been cited were: (a) the amendment of the Constitution in 1991; (b) the election of Lee Teng-hui as the President by a general election in 1996; (c) the announcement of the “special state-to-state relationship” statement by Lee Teng-hui in 1999; and (d) the announcement of the “two countries each on one side (of the Taiwan Strait)” statement by Chen Shui-bian. This subsection will examine whether any of the events listed above amounted to an act of declaration of the ROC under Lee Teng-hui or Chen Shui-bian sufficient to establish a new State in international law.

a. The Amendment of the Constitution in 1991

When Lee Teng-hui in the 1999 TV interview said that “The 1991 Amendment to the ROC Constitution designated the cross-Strait relationship as a special state-to-state relationship,”⁵⁹¹ he seemed to indicate that the ROC turned into a “State” by the constitutional amendment, thus, “there is no need of declaring independence.” As explained before, the amendments of the Constitution, both in 1991 and 1992, did not change the character of the Nanjing (Nanking) Constitution as a constitution for the entire country of China. A change in the method of electing the President from an indirect election to a general election in 1992 did not make the political institution a new State. Such a change in procedural rules does not effect a change in the substantive status of a political institution.

⁵⁹¹ See *supra* text accompanying note 566.

b. The Election of Lee Teng-Hui as the President by a General Election in 1996

Advocates of this view held that the new direct election by the people of the ROC's President and Vice President to replace the indirect election by the National Assembly created a new State. Again, this was simply a change in procedure, rather than a substantive change in the nature of the political institution. If a change in the constitution of the method of electing the President and the Vice President did not create a new State, neither would the implementation of the new method.

c. The Announcement of the "Special State-to-State Relationship" Statement by Lee Teng-Hui in 1999

Lee's "special state-to-state relationship" statement was not a declaration of independence or a declaration establishing a State. As fully discussed earlier, Lee had no intention to establish a new State limiting its territory to the island of Taiwan. In fact, Lee's statement that there was no need to declare independence in the TV interview negated any interpretation that the statement was itself a declaration of independence. A declaration for the establishment of a new State is a solemn statement and should be open and clear. The purpose of such a declaration is to make the existence of a new state open and unambiguous to the population and other States. Every State has a birthday. A new state cannot gradually evolve into existence. The modern State practice is to make such declaration by the political leader, such as the Executive head of the government, or representatives of the people, such as the legislature, in a document officially executed and announced in public to the international community. Lee's statement, made in an interview by a foreign reporter in a closed chamber, not supported by any formal document, was not a serious declaration, which would establish statehood.

d. The Announcement of the "Two Countries Each on One Side (of the Taiwan Strait)" Statement by Chen Shui-Bian

Chen's statement was not a declaration establishing a new State either. Chen made the statement to limited attendees of a conference via a closed circuit TV, not to the public in general. Such an oral statement was not qualified as an official declaration establishing a State. Similar to Lee's "special state-to-state relationship" statement, Chen's statement was not an open and unambiguous statement to the world of establishing statehood. Additionally, Chen subsequently negated any notion that

Taiwan had become a State when he said that he “[would] not declare independence.”⁵⁹²

The above analyses of the events demonstrated that none of them constituted an act of declaration establishing a new State limiting its territory to the island of Taiwan. Thus, there was no point in time or event that the ROC transformed into a State during the tenure of the two ROC Presidents. A comment by the drafters of the Restatement states that “Taiwan might satisfy the elements of the definition [of a State], but its authorities have not claimed it to be a State, but rather part of the State of China.”⁵⁹³ Failure to formerly declare independence prevented the ROC from being a State.

B. The ROC Has Not Acted Like a State in the World Community

For a political institution to become a State effectively existing, after it declares establishment of statehood, it must assert statehood in the world community. That neither Lee Teng-hui nor Chen Shui-bian established a new State was evidenced by their subsequent government practice in participating international affairs. Both Presidents asserted that the ROC was an “independent country.” If the ROC was a State, its subsequent actions did not match the words. In its attempts to participate the world organizations, the ROC did not assert statehood as illustrated by its attempts to rejoin the United Nations or its participation in the Olympic Games, APEC (Asia Pacific Economic Cooperation), and WTO (World Trade Organization).

a. The United Nations

During the presidency of Lee Teng-hui, the ROC began a campaign to join the United Nations. Since December 1971 when the UN General Assembly decided by Resolution No. 2758 that its member State, China, was to be represented by the PRC government, the ROC in Taiwan was shut out from the United Nations and its related organizations. Twenty-two years later, beginning in 1993 when Lee Teng-hui was the President, the ROC attempted to rejoin the United Nations.

Importantly, in its attempt to join the United Nations, the ROC did not apply for a new membership. Under the UN Charter, an application

⁵⁹² See *supra* text accompanying note 583.

⁵⁹³ THE RESTATEMENT, *supra* note 212, ‘201, Comment f (3d Ed., 1987).

by a State to join the United Nations as a new member is to be submitted through the Secretary General's office to the Security Council for approval. Lee Teng-hui did not apply to the Security Council for the ROC to be a new member.

Instead, Lee Teng-hui sought to regain China's seat in the United Nations, which the ROC lost in 1971. Before the UN General Assembly's session in September 1993, the ROC asked friendly countries to submit a request to the General Committee, which was in charge of arranging the General Assembly's annual meeting agenda, to include in the agenda a discussion of the return of "The Republic of China" to the United Nations. The General Committee denied the request. From 1994 to 1999, Lee Teng-hui repeated the request each year. Each time, the request was denied.

President Chen Shui-bian continued the effort to join the United Nations. Although Chen called the ROC a "sovereign independent country," he did not apply to the United Nations for a new membership either. The ROC again sought to return to China's seat, which was occupied by the PRC government. Like Lee Teng-hui, Chen also sought the assistance of friendly States to send the request for inclusion of the matter in the General Assembly's annual meeting agenda every year.⁵⁹⁴ Each year, the General Committee rejected the request.

The reason which the ROC gave for returning to the United Nations changed many times. In Lee Teng-hui's time, at the beginning, the application challenged Resolution 2758 itself.⁵⁹⁵ In 1998, the ROC requested the UN General Assembly to revoke the Resolution, and restore the ROC's rights at the United Nations by allowing the ROC to participate in the United Nations.⁵⁹⁶ In 1999, the Lee administration softened the stand and requested to return to the United Nations solely to represent the people of Taiwan. In its supporting documents, the ROC requested the United Nations to allow the State of China to be represented by two governments: the PRC and the ROC. The document claimed that the twenty three-million people under the ROC were not represented in the

⁵⁹⁴ *Request for the inclusion of a supplementary item in the agenda of the fifty-fifth session.* General Assembly. Distr.: General, 4 August 2000. In 2002, the application used the name "the Republic of China (Taiwan)," and the Explanatory memorandum claimed that "the Republic of China (Taiwan) is a sovereign state."

⁵⁹⁵ UN G.A. Res. 2758, UN GAOR, 26th Sess., 1976th mtg. at 358 (1971).

⁵⁹⁶ *Request for the inclusion of an item in the provisional agenda of the fifty-third session.* General Assembly. Distr.: General, 8 July 1998.

United Nations.⁵⁹⁷ Chen Shui-bian, in the request (application) of 2002, argued that Resolution No. 2758 “has been subsequently misused to justify the exclusion of Taiwan.”⁵⁹⁸ It claimed that participation in the United Nations was the fundamental human right of the people of Taiwan.⁵⁹⁹

In the requests submitted to the United Nations, Chen also created a new identity for the ROC by associating the name “The Republic of China” with “Taiwan.” When the Chen administration first applied to the United Nations in 2000, the document used the name “The Republic of China on Taiwan.”⁶⁰⁰ The word “Taiwan” was but a geographic name where “the Republic of China” government was located. But in 2002, the Chen administration created a new name by incorporating the word “Taiwan” into the official name when Chen used the term “The Republic of China (Taiwan)” as the applicant.⁶⁰¹ In 2006, the word “Taiwan” then became an alternative term for the name of “the Republic of China” when the supporting document (Explanatory memorandum) began with “the Republic of China (hereinafter referred to as ‘Taiwan’) is a free and peace-loving sovereign State.”⁶⁰² Despite the new name used by the ROC, the General Committee rejected the requests.

Frustrated by the repeated rejections of the United Nations of the ROC’s applications to become a member, President Chen in July, 2007 sent to the UN Secretary-General Ban Ki-Moon an application for a new UN membership in the name of “Taiwan.”⁶⁰³ Ban Ki-Moon rejected the application arbitrarily and returned it without submitting the application

⁵⁹⁷ *Request for the inclusion of a supplementary item in the agenda of the fifty-fourth session.* General Assembly. Distr.: General, 12 August 1999.

⁵⁹⁸ *Request for the inclusion of a supplementary item in the agenda of the fifty-seventh session.* General Assembly. Distr.: General, 20 August 2002.

⁵⁹⁹ *Id.*

⁶⁰⁰ The request (application) of 2000 used the name “the Republic of China on Taiwan.” The ‘Explanatory memorandum’ stated “The Republic of China is a democratic country.” *Request for the inclusion of a supplementary item in the agenda of the fifty-fifth session.* General Assembly. Distr.: General, 4 August 2000.

⁶⁰¹ In 2002, the application used the name “the Republic of China (Taiwan),” and the Explanatory memorandum claimed that “the Republic of China (Taiwan) is a sovereign state.”

⁶⁰² In 2006, the application used the name “the Republic of China (hereinafter referred to as Taiwan).”

⁶⁰³ See Chieh-yu Lin, *UN secretary-general stops calling ‘Taiwan part of China, supra note 590.*

to either the Security Council or the General Assembly for consideration. Ban cited “the UN’s one-China policy based on Resolution No. 2758” as his grounds for rejection.⁶⁰⁴

The ROC’s attempts to join the United Nations have thus far failed.⁶⁰⁵ The failure cannot be solely attributed to obstruction by the PRC government. There was a legal aspect in the ROC’s applications that was repugnant to the principle of international law. The United Nations is an organization formed by States; only political institutions with statehood may be members. Yet, the ROC government never declared establishment of a new State independent of China and never applied for a new membership as a new State. It just attempted to *return* to the UN General Assembly to share the China seat with the PRC government. As stated in Chapter 2, The State and Sovereignty, sovereignty is indivisible. Only one government can represent a State. International law does not permit dual representation of a State.

b. World Olympic Games and APEC

The ROC’s athletic teams use the name “Chinese Taipei” in the World Olympic Games.⁶⁰⁶ The ROC had used the name “the Republic of China” in the Olympic Games until 1988 when the International Olympic Committee (the IOC) refused its use of the name under pressure from the PRC.⁶⁰⁷ In 1989, an agreement was reached between the PRC and the ROC that “in all the occasions of the IOC, Taiwan should be called ‘Chinese Taipei’ (*Zhonghua Taipei*).”⁶⁰⁸ Later, when the ROC joined the APEC, it did not use the name “the Republic of China” or Taiwan but again used the name “Chinese Taipei.” Thus, the ROC did not assert statehood while participating in the Olympic Games and APEC, but instead acquiesced to being referred to as a part of China.

⁶⁰⁴ Ban returned the application on July 23, 2007.

⁶⁰⁵ See Chiang, *UN Sends Coordinating Rescue Team to Taiwan*, *supra* note 578.

⁶⁰⁶ The term “Chinese Taipei” was first used in Olympic Games. See CATHERINE K. LIN, NATIONALISM IN INTERNATIONAL POLITICS: THE REPUBLIC OF CHINA’S SPORTS FOREIGN POLICY-MAKING AND DIPLOMACY FROM 1972 TO 1981.)

⁶⁰⁷ Jacques de Lisle, *The Chinese Puzzle of Taiwan’s Status*, ORBIS, Jan. 1, 2000, at 35.

⁶⁰⁸ Interview with Ma Yin-jeou, available at <http://www.washingtonpost.com/wp-dyn/content/article/20081209-27>. Last visited 12/10/2008. See Catherine K. Lin, *supra* note 606.

c. *The GATT and WTO*

In its application to join the General Agreement on Tariff and Trade (the GATT) and WTO,⁶⁰⁹ the ROC did not assert to be a State either.⁶¹⁰ After World War II, in order to promote world trade, 23 States signed the GATT.⁶¹¹ Initially, all signatories were States. However, some members, particularly the United Kingdom and France, had overseas territories, which, due to their special geographical and economic conditions, would suffer hardships if they were subject to the same customs duty and other import regulations as their parent States. Therefore, GATT was amended to add a new type of membership called “Customs Territories.” This type of membership permitted these overseas territories, with the sponsor of their parent States, to join as members and to be treated separately from their parent States. The United Kingdom was a member of GATT and made her territory Hong Kong a Customs Territory for it to join GATT as a separate member. The United Kingdom did this before it handed Hong Kong over to China in 1987 pursuant to an international agreement of 1985.⁶¹² In 1995, GATT transformed into the WTO.

The ROC attempted to apply for membership of GATT and later the WTO for many years before it was finally admitted in 2002. Although President Lee Teng-hui and President Chen Shui-bian claimed that the ROC was a “sovereignty[sic] independent country,” when the ROC applied to join GATT and later the WTO as a member, it did not apply

⁶⁰⁹ Agreement Establishing the Multilateral Trade Organization (World Trade Organization), Dec. 15, 1993, 33 I.L.M. 13 (1994). *Taiwan WTO Entry See To Be Delayed Until Mid-next Year*, CHINA NEWS, Dec. 9, 1999, available in 1999 WL 17736320; Jack de Lisle, *supra* note 607, at 35.

⁶¹⁰ Deborah Shen, *ROC Reinforces WTO Entry Bid*, FREE CHINA J., 12/13/1996, at 2.

⁶¹¹ General Agreement on Tariffs and Trade, opened for signature on Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 (1950).

⁶¹² *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong*, available at <http://www.info.gov.hk/trans/jd/jd2.htm>. Last visited 10/25/2006. See 22 U.S.C. '5712(3) (1994) (providing that “The United States should respect Hong Kong's status as a separate customs territory”); 22 U.S.C. '5713(3) (1994) (stating that “The United States should continue to recognize Hong Kong as a territory which is fully autonomous from the United Kingdom and, after June 30, 1997, should treat Hong Kong as a territory fully autonomous from the People's Republic of China with respect to economic and trade matters”); 22 U.S.C. '5722(a) (1994) (allowing US President to suspend laws of United States with respect to Hong Kong if President “determines that Hong Kong is not sufficiently autonomous to justify treatment under a particular law of the United States.”).

as a State. It could not use the name “China” because a great majority of the member States did not regard the ROC as the representative government of China. It did not apply in the name of the “ROC” because it was the name of a government and the ROC did not assert that it was a State in international affairs. Thus, the ROC applied as a Customs Territory. The ROC used the name “The Customs Territory of Taiwan, Penghu, Kinmen, and Matsu” in its application.⁶¹³

In short, the ROC did not assert that it was a State in the international community, but instead claimed to be just a part of a State, China. In conclusion, other States did not regard the ROC in Taiwan as a State because the ROC did not act as a new State.

8. POSITION OF MA YING-JEU ON THE POLITICAL STATUS OF THE ROC

The KMT Party regained political power in 2008. In March 2008, when Chen's term was about to expire, there was a two-way competition in a general election of the ROC President between Hsieh Chang-ting of the DPP Party and Ma Ying-jeou (Ma) of the Chinese Nationalist Party (the KMT). Ma won the election and the KMT Party regained the executive power of the ROC after eight years of the DPP rule.

After Ma, a native of Hong Kong (China), assumed the presidency of the ROC in May 2008, he announced that Taiwan was merely a region. There were two implications of the statement that “Taiwan is a region.” One was that Taiwan was part of China. By referring to Taiwan as a region, Ma implied that Taiwan was China's territory. The other implication was that the ROC was not a State. He ordered his officials, in dealing with foreign countries, to refer to the island, as “Chinese Taipei,” instead of “the ROC” or “Taiwan.”

To the Taiwanese people, the illusion that the ROC was a State was shattered overnight. When Ma invited a PRC official Chen Yun-lin in charge of Taiwan Affairs to visit Taipei on November 6, 2008, the national flags of the ROC in the reception hall were removed before Chen's arrival; the Chinese official addressed him “Mr. Ma,” not

⁶¹³ A statement accompanying the application of the Republic of China to join the General Agreement on Tariff and Trade (GATT) and the World Trade Organization (WTO) states that “[t]he Customs Territory of Taiwan, Penghu, Kinmen and Matsu (hereinafter referred to as Chinese Taipei) is preparing to accede to the General Agreement on Tariffs and Trade (GATT), which itself has been reorganized into the World Trade Organization.”

“President Ma.” When the people held a demonstration against him for giving up “Taiwan’s sovereignty” on May 17, 2009, he rebutted that “No country in the world thinks that Taiwan was not a country.” But the people knew that he made the statement simply to pacify them.

In July 2010, Ma’s government and the PRC government entered into a trade agreement called “the Economic Cooperation Framework Agreement (ECFA).”⁶¹⁴ The ECFA, said to promote trades between Taiwan and China, was not signed by the two governments, but by governmental agencies from both sides.⁶¹⁵ Whether such an agreement binds the governments is an intriguing question for constitutional lawyers. Subsequently, the Agreement was sanctioned by the Institute of Legislation (The Legislature *Yuan*).

But in August 2010, Ma gave an intriguing characterization of the nature of the ECFA. The deputy news editor of Taipei Times wrote in an editorial that “Ma on Wednesday (August 4, 2010) told visiting Japanese academics that the Economic Cooperation Framework Agreement (ECFA) signed in late June was not a treaty signed between two states [because] [w]e do not recognize China as a state, so our relationship with each other is not one of state-to-state.”⁶¹⁶ The statement implied that while the ROC was a State, the PRC was not. Ma Ying-jeou later said that “China” in the term “One China” referred to the ROC. This was the position of the KMT’s one-China dogma. His characterization of the ROC was contradictory to his earlier statement that “Taiwan is a region.”

Whatever characterization Ma made with respect to the ROC, he did not intend to establish a new State limiting its territory to the island of Taiwan. As London’s Economist magazine observed, “Ma, unlike his predecessor, the DPP’s Chen Shui-bian, has not trumpeted Taiwan’s

⁶¹⁴ Ma Ying-jeou, the former President of the ROC in Taiwan, did not claim that Taiwan was a State. He referred to Taiwan as an area, which was a term that implied that Taiwan was a part of China. *Ma repeats “area-to-area” comment*, Taipei Times, by Loa Iok-sin(staff reporter), 12/22/2008, available at <http://www.taipetimes.com/News/taiwan/archives/2008/12/22/2003431770>. Last visited 6/24/2013. Hong Kong is also part of China, now considered a semi-autonomous region of China, abbreviated as “SAR.”

⁶¹⁵ For official information on ECFA, see *Background Information on ECFA*, available at <http://www.mac.gov.tw/public/data/042611402.pdf>. Last visited 04/10/2011.

⁶¹⁶ The Agreement was signed by the PRC’s HaiChi (The Sea Foundation) Association and the ROC’s Luwei (The Mainland Affairs) Association.

separate identity.”⁶¹⁷ The position he took was: The ROC was not a State separate from China.

9. POSITION OF TSAI ING-WEN ON THE POLITICAL STATUS OF THE ROC

In 2016, the DPP Party regained the political power in Taiwan. In a presidential election in January 2016, the contest was between the DPP's candidate Tsai Ing-wen and KMT's candidate Chu Li-lung. Tsai won a landslide victory.

In her inaugural speech, Tsai said that she wanted to maintain the established relation with the PRC government and referred to the ROC and the PRC as two “institutions representing each side across the strait.”⁶¹⁸ She did not leave any impression that she wanted to establish a new state limiting its territory to the island of Taiwan. On May 29, when the Minister of Public Health of her administration spoke at the WHA in Geneva, he kept referring to Taiwan as “Chinese Taipei,” a name which implies that the island was part of China, not a state.⁶¹⁹

⁶¹⁷ Id. J. Michael Cole, *President Ma disappears the PRC*, TAIPEI TIMES, Sunday, 08/8/2010, P8, available at <http://www.taipeitimes.com/News/editorials/archives/2010/08/08/2003479868>. Last visited 08/08/2010. Cole is the deputy news editor of TAIPEI TIMES.

⁶¹⁸ “(Ma) [u]nlike his predecessor, the DPP's Chen Shui-bian, has not trumpeted Taiwan's separate identity.” *China and Taiwan, The Ties that Bind?* THE ECONOMIST, 07/5/2010, available at <http://www.economist.com/node/16485487>. Last visited 07/18/2010.

⁶¹⁹ Tsai's inaugural speech. TAIPEI TIMES, 2016/05/21, at <http://www.taipeitimes.com/News/front/archives/2016/05/21/2003646753>, Last visited 2016/06/02.